Supreme Court, U.S.
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No. _____

In The
Supreme Court Of The United States
October Term, 1994

JOHN G. ROWLAND, GOVERNOR
OF THE STATE OF CONNECTICUT,
LINDA D'AMARIO ROSSI, COMMISSIONER,
STATE OF CONNECTICUT
DEPARTMENT OF CHILDREN AND FAMILIES,

Petitioners

v.

JUAN F., ET AL.,

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Printed by

Brescia's Printing Services, Inc.
66 Connecticut Boulevard
East Hartford, CT 06108
528-4254

QUESTIONS PRESENTED

1. Whether a court order requiring a State agency immediately to hire hundreds of new social workers, entered pursuant to an institutional consent decree which contains no such hiring requirement, violates the long-standing principle that a consent decree must be construed and enforced only within its express terms.

2. Whether modification of a consent decree to impose new, more burdensome obligations on the State, at a time when the State is in compliance with the decree, is inconsistent with the principles set forth by this Court in Rufo v. Inmates of Suffolk County Jail, 502 U.S. 367 (1992).

LIST OF PARTIES

The plaintiffs in the proceedings before the United States District Court for the District of Connecticut were Juan F., by next friends Brian Lynch and Isabel Romero; Becky M., by next friends Morris Wessel, M.D., and Nancy Orsi; Benjamin B., by next friends Barry Kasdan, and Edythe Latney; Jason B., by friends George Pipkin and John Leventhal, M.D.; Anna R., by friends Cesar Batalla and Julia Ramos Grenier; Dominique S., by friends Nancy Humphreys and Margaret Penn; Patrick S., by friends Jerry Reisman and Julia Hamilton; Daniel C., by friends Patrick Bologna and Cynthia McKenna; Florence J., by friends Michael Rohde and Judith Hyde, on behalf of themselves and all others similarly situated. The defendants were William O'Neill, Governor, State of Connecticut, and Amy B. Wheaton, Commissioner, Department of Children and Youth Services, State of Connecticut, in their official capacities.

When the United States Court of Appeals for the Second Circuit rendered its decision, statewide elections had resulted in the substitution of Lowell P. Weicker, Jr., Governor of the State of Connecticut, and Rose Alma Senatore, Commissioner of the State of Connecticut Department of Children and Families, for the defendants.

Following the defendants' Petition for Rehearing with Suggestion for Rehearing in Banc, statewide

elections again resulted in an automatic substitution of defendants pursuant to Supreme Court Rule 35.3. At the present time, the petitioners are John G. Rowland, Governor of the State of Connecticut, and Linda D'Amario Rossi, Commissioner of the Department of Children and Families. The respondents are the plaintiffs listed above.

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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1994

JOHN G. ROWLAND, GOVERNOR
OF THE STATE OF CONNECTICUT,
LINDA D'AMARIO ROSSI, COMMISSIONER,
STATE OF CONNECTICUT
DEPARTMENT OF CHILDREN AND FAMILIES
Petitioners

v.

JUAN F., ET. AL.
Respondents

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

The Petitioners, John G. Rowland, Governor of the State of Connecticut, and Linda D'Amario Rossi, Commissioner of the Connecticut Department of Children and Families, respectfully pray that a writ of certiorari issue to review the decision of the United

States Court of Appeals for the Second Circuit entered in this case on October 13, 1994.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit is reported at 37 F.3d 874 (2d Cir. 1994) and is printed in the Appendix to this petition at App.1-A.[1/] An order denying the petitioners' timely Petition for Rehearing with Suggestion for Rehearing in Banc was entered by the Second Circuit on January 23, 1995. App. 28-A.

The order of the United States District Court for the District of Connecticut, Nevas, J., was entered on June 25, 1993, in verbal form and is unreported. The relevant pages of the transcript of the hearing at which the order was entered are reprinted in the Appendix at App. 21-A. The Court Monitor's recommendations adopted by the District Court are reprinted at App. 30-A.

JURISDICTION

The judgment and opinion of the United States Court of Appeals for the Second Circuit were made and entered on October 13, 1994, and copies are printed in the Appendix. App. 1-A. This petition is filed within

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1/ The abbreviation "App." refers to the Appendix herein.

ninety days of the order denying the petitioners' timely Petition for Rehearing with Suggestion for Rehearing in Banc, issued by the United States Court of Appeals for the Second Circuit on January 23, 1995, and printed in the Appendix at App. 28-A.

The jurisdiction of this Court to review the judgment of the United States Court of Appeals for the Second Circuit is invoked under 28 U.S.C. §1254(1).

STATEMENT OF THE CASE

This petition arises from an appeal of an order of the United States District Court for the District of Connecticut modifying an institutional consent decree. The District Court had jurisdiction over the case pursuant to 42 U.S.C. §1983 and 28 U.S.C. §1331.

The petitioners are the Governor of the State of Connecticut and the Commissioner of the State of Connecticut Department of Children and Families. The respondents are children who are in foster care or at risk of being placed in foster care. The consent decree was entered into by the petitioners and the respondents to settle a class action suit brought by the respondents to challenge Connecticut's administration of its child welfare system. Under the terms of the decree, the Department of Children and Families (the "Department") was required to meet certain caseload and staffing ratios for its employees by July 1, 1994. These ratios specified the maximum number of cases

that a social worker could handle at any given time, the maximum number of workers that a supervisor could supervise, and the minimum number of support staff that had to be available to certain types of departmental units. However, the decree specifically left it to the Department to determine how to meet the ratios by July 1, 1994. While the State made many concessions in the Consent Decree, hiring timetables were not one of the things to which the State agreed.

In the spring of 1993, the Connecticut General Assembly appropriated funds for most, but not all, of the positions that the Department had requested to carry out the obligations of the decree. By reallocating funds within the agency, the Department thereafter developed a plan that would have enabled it to be in substantial compliance with all caseload ratios mandated by the decree by the July 1, 1994 deadline.[2/] Nonetheless, in May, 1993, more than one year before the July 1, 1994 deadline, the respondents notified the court-appointed monitor that they would seek contempt and other relief in the District Court.

The monitor met with the parties in June, 1993, and, disregarding the petitioners' plan for achieving

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2/ Under the plan, over 90% of the workers expected to be needed in order to meet the caseload ratios would have been hired and fully trained by July 1, 1994. The remaining positions would have been filled within seven months thereafter.

compliance, issued a report recommending modifications to the consent decree based on his prediction that the Department would not be in 100% compliance with the decree by the July 1, 1994 deadline.

On June 25, 1993, the District Court held a brief hearing to consider the monitor's report. Despite the court's explicit acknowledgment that the Department could not be held in contempt at that time because there was no evidence that the Department was out of compliance with the decree, the court adopted the monitor's recommendations.

Under the District Court's order, the Department was required to hire 248 new staff by July 1, 1993, i.e., within six days, and 242 new staff by January 1, 1994. This constituted a major change in the terms of the decree. Nothing in the decree required a particular number of social workers to be hired, nor did it require that caseload and staffing ratios be achieved until July 1, 1994. These changes fundamentally altered the decree, disregarded the agency's plan for compliance, and cost the State millions of dollars more than had been budgeted.

The petitioners appealed to the United States Court of Appeals for the Second Circuit, which affirmed the District Court's order on October 13, 1994. The Second Circuit concluded that a court is not rigidly confined to the terms contained within the four corners of a consent decree and that the District Court's order, requiring the State to hire hundreds of social workers

on a specific timetable never agreed to by the parties, was not a modification of the consent decree, even though the consent decree contained no such requirements. The Second Circuit further held that even if the changes were a modification, they nonetheless satisfied the standards for modification of a consent decree set forth by this Court in Rufo v. Inmates of the Suffolk County Jail, 502 U.S. 367 (1992).

The petitioners filed a timely Petition for Rehearing with Suggestion for Rehearing in Banc which was denied by the United States Court of Appeals for the Second Circuit on January 23, 1995.

REASONS FOR GRANTING THE WRIT

This case raises an issue of critical importance concerning the implementation of institutional consent decrees. If, as happened in this case, a federal judge can order a state immediately to hire hundreds of new workers, pursuant to a consent decree that contains no such hiring requirement, then it is impossible for parties to anticipate the extent of their obligations in agreeing to the decree. The Second Circuit upheld such a change on the ground that the change was not a "modification" of the decree. This decision clearly conflicts with and undermines this Court's ruling in Firefighters Local Union No. 1784 v. Stotts, 467 U.S. 561 (1984). The Second Circuit also turned this Court's ruling in Rufo v. Inmates of the Suffolk Country Jail, 502 U.S. 367

(1992), on its head. The court concluded that even if the changes ordered by the District Court did "modify" the decree, the modification met the standards for modification set forth in Rufo. This decision ignores the fact that Rufo was intended to ease, not increase, the burdens on states under consent decrees, and conflicts with the Sixth Circuit's decision in Lorain NAACP v. Lorain Board of Education, 979 F.2d 1141 (6th Cir. 1992), cert. denied, __ U.S. __, 113 S. Ct. 2998 (1993). Review is warranted to resolve these conflicts and to preserve the principle that consent decrees are to be construed and implemented in accordance with the terms agreed to by the parties. This principle is critically important to preserve consent decrees as a viable option for resolving institutional reform litigation.

I. THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT HAS RENDERED A DECISION IN DIRECT CONFLICT WITH A PRIOR RULING OF THIS COURT.

The Second Circuit in the present case adopted the following legal principle for construing a consent decree:

> [I]n implementing the purposes of a decree, a court is not rigidly confined only to the terms contained within the four corners of the parties' agreement.

Juan F. by and through Lynch v. Weicker, 37 F.3d 874, 878 (2d. Cir. 1994). The court held, based on this principle, that the District Court had not modified the consent decree between the petitioners and the respondents when it ordered the petitioners to hire specific numbers of employees by particular deadlines, even though these requirements were nowhere contained in the consent decree and had never been agreed to by the parties. Because this holding is in direct conflict with this Court's ruling in Firefighters Local Union No. 1784 v. Stotts, 467 U.S. 561 (1984), certiorari should be granted in this case.

The Stotts case involved a consent decree designed to remedy allegedly discriminatory hiring and promotional practices by the Memphis, Tennessee, Fire Department. Under the decree, the City of Memphis agreed to adopt a long term goal of increasing minority representation in each job classification within the department. Nothing in the decree addressed the handling of layoffs. Subsequently, when layoffs became necessary, the district court modified the decree by enjoining the City from laying off employees in accordance with its preexisting seniority system because layoffs under such a system would have effectively reduced the percentage of minority employees in the fire department, contrary to the purpose of the consent decree. The Court of Appeals affirmed.

This Court reversed, based on the fundamental principle that:

> [T]he "scope of a consent decree must be discerned within its four corners, and not by reference to what might satisfy the purposes of one of the parties to it" or by what "might have been written had the plaintiff established his factual claims and legal theories in litigation."

Id. at 574 (quoting United States v. Armour & Co., 402 U.S. 673, 681-682 (1971)). According to this Court, had the parties intended to depart from the already existing policy governing layoffs, they would have said so in the decree. In the absence of an express provision concerning layoffs, such a provision could not be mandated by the courts, even in an effort to achieve the overall goal of the consent decree.

The rationale for this conclusion is that:

> Consent decrees are entered into by parties to a case after careful negotiation has produced agreement on their precise terms.... Naturally, the agreement reached normally embodies a compromise; in exchange for the saving of cost and elimination of risk, the parties each give up something they might have won had they proceeded with the litigation....Because the defendant has, by the decree, waived his right to litigate the issues raised, ...the conditions upon which he has given that waiver must be respected, and the instrument must be construed as it is written.

United States v. Armour, 402 U.S. 673, 681-682 (1971) (footnote omitted). To conclude otherwise would

effectively discourage parties from settling by consent decree.

Despite the clear language of Stotts, and of cases in other Circuits that have adopted the same principle, see Lorain NAACP v. Lorain Board of Education, 979 F.2d 1141 (6th Cir. 1992), cert. denied, __ U.S. __, 113 S. Ct. 2998 (1993); Halderman v. Pennhurst State School and Hospital, 901 F.2d 311 (3rd Cir.), cert. denied, 498 U.S. 850 (1990); San Francisco NAACP v. San Francisco Unified School District, 896 F.2d 412 (9th Cir. 1990), [3/] the Second Circuit in the present case concluded that the District Court was not confined to the four corners of the parties' agreement in construing the Juan F. consent decree. Specifically, the Second Circuit held that the District Court had not modified the decree when it ordered the Department to hire 248 new staff by July 1, 1993, and another 242 new staff by January 1, 1994, even though the decree purposely did not require the Department to hire any employees[4/] and did not require the caseload ratios to be met until July 1, 1994.

3/ Prior to the present case, even the Second Circuit had followed Stotts. See Crumpton v. Bridgeport Education Association, 993 F.2d 1023 (2d Cir. 1993).

4/ The sole hiring requirement in the decree required the State to hire six nurse practitioners by July 1, 1993 and the court order did not change that. Consequently, the petitioners did not challenge that aspect of the order.

In drafting the decree, the parties intentionally focused on caseloads rather than on hiring requirements because caseloads fluctuate considerably over time, and it was anticipated that the agency would need to be free to adjust its hiring levels to meet the changing caseload figures. The District Court's order not only ignored the express language of the decree, but also drastically altered a critical component of the parties' agreement. To hold, as the Second Circuit has done, that such changes are a permissible construction, rather than a modification, of the decree, squarely contravenes the fundamental principle set forth in Stotts that a consent decree must be construed as it is written.

As a practical matter, if the Second Circuit's conclusion that the District Court's order was not a modification of the consent decree is permitted to stand, the clear message to parties considering entering a consent decree will be that they can no longer rely on the negotiated, express terms of the decree to define the scope of their future obligations. If, as here, a court can order that 242 staff be hired in a week, pursuant to a consent decree that contains no such hiring requirements, and then conclude that it has not modified the decree, then no party can know what obligations it has agreed to when it signs a decree.

A consent decree is the product of the parties' willingness to resolve their dispute without a judicial determination on the underlying merits of that dispute. The Second Circuit's decision opens the door to

significant, unanticipated changes. The effect of such a decision will be to discourage parties from foregoing their right to litigate the underlying dispute in an attempt to reach a mutually agreeable resolution, thereby burdening litigants and the already overburdened courts. Certiorari should be granted to remedy this result.

II. THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT HAS RENDERED A DECISION THAT CONFLICTS WITH AND UNDERMINES THIS COURT'S RULING IN RUFO V. INMATES OF THE SUFFOLK COUNTY JAIL, 502 U.S. 367 (1992), AND DIRECTLY CONFLICTS WITH A RULING OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

The Second Circuit concluded that even if the District Court's order constituted a modification of the Juan F. consent decree, the changes satisfied the standards for modification of a consent decree set forth in Rufo v. Inmates of the Suffolk County Jail, 502 U.S. 367 (1992). Certiorari should be granted in this case because the Second Circuit's decision totally misconstrues and misapplies this Court's ruling in Rufo and conflicts with a ruling of the United States Court of Appeals for the Sixth Circuit.

In Rufo, this Court adopted standards for modifying institutional consent decrees. Recognizing that changes in circumstances may affect the ability of government administrators to implement an

institutional consent decree, this Court concluded that modification of a decree may be warranted to ease the burden on the state "when changed factual conditions make compliance with the decree substantially more onerous." Id. at 384.

In so holding, this Court's focus was on providing relief to the state. See id. at 378 (citing Fed. R. Civ. P. 60(b)) and 392. In particular, this Court sought to ensure that a state would not be forever bound by a decree that has become unduly burdensome due to circumstances beyond its control, and that any modification would be undertaken with deference "to local government administrators, who have the 'primary responsibility for elucidating, assessing and solving' the problems of institutional reform." Id. at 392 (quoting Brown v. Board of Education, 349 U.S. 294, 299 (1955)).

The question at issue in the present case, whether a district court may modify an institutional consent decree to increase, rather than ease, the burdens on the state, was addressed by the Sixth Circuit in Lorain NAACP v. Lorain Board of Education, 979 F.2d 1141 (6th Cir. 1992), cert. denied, __ U.S. __, 113 S. Ct. 2998 (1993). In Lorain, the plaintiff Board of Education sought to modify a school integration consent decree to substantially increase the financial obligations of the defendant state, which had expressly limited its liability under the consent decree to one million dollars. While acknowledging that desegregation measures had proved to be far more costly than anticipated, the court

concluded that a district court has no authority to modify an institutional consent decree over the state's objections, in the absence of an adjudicated or admitted violation of law, in order to impose additional obligations on the state. Id. at 1153. As stated by the court, "we think it is obvious that the law should assign great significance to whether a party seeking modification requests relaxation of the terms of [the] consent decree or the imposition of additional burdens and obligations." Id. at 1152. Citing Rufo, the court noted that Federal Rule of Civil Procedure 60(b) allows for relief from the terms of a consent decree where the terms are no longer equitable, but that there is no comparable provision allowing for an increase in the burdens of a consent decree. Id. at 1153.

The Second Circuit's opinion in this case squarely conflicts with the Sixth Circuit's ruling in Lorain and turns Rufo on its head. According to the Second Circuit, the Connecticut General Assembly's failure to grant all of the funds requested by the Department for implementation of the Juan F. decree warranted modification of the decree.[5/] However, far

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5/ In fact, Rufo explicitly recognizes that financial constraints "are a legitimate concern of government defendants in institutional reform litigation ...," Id. at 392-393, and the potential for the General Assembly to refuse to appropriate all funds requested by the agency was necessarily anticipated by the parties.

from easing the State's burden of compliance given these budget constraints, the Second Circuit interpreted Rufo to permit modification to impose new, substantially more burdensome obligations on the State. In so holding, the Second Circuit totally failed to defer to the State, which had designed a plan for implementing the decree without modification, ignored the express terms of the decree, and rendered compliance with the decree even more difficult for the State than it already was. This cannot have been the intent of Rufo.

Moreover, the Second Circuit permitted the District Court to make the consent decree more onerous to the State based not on a finding of fact that a significant and unanticipated change in circumstances had occurred, but rather on a speculative assessment that the State's future compliance -- a year into the future --was likely to fall short of 100%. As conceded by the District Court and the parties, the State was not out of compliance with the caseload requirements of the consent decree when the court issued its order. In fact, it was not even possible to make a finding that the State would be out of compliance with the caseload requirements of the consent decree because those caseloads fluctuate over time and the compliance deadline was a year away. Nonetheless, without holding an evidentiary hearing on the need for modification, and without even permitting the Commissioner to

testify about the Department's plans and ability to achieve compliance, the District Court modified the decree. In upholding the modification, the Second Circuit has expanded Rufo to give a court broader authority over a party currently in compliance with a consent decree than the court would have over the same party, in a contempt proceeding, who is merely in substantial compliance with the decree. This Court could not have intended Rufo to create such an anomaly.

Review of the Second Circuit's decision is therefore essential to clarify the scope of this Court's ruling in Rufo and to resolve the conflicting conclusions of the Second and Sixth Circuits. If permitted to stand, the Second Circuit's decision will give plaintiffs unprecedented power to seek modification of institutional consent decrees, based solely on predictions that the defendant will not be in 100% future compliance, and to obtain relief that not only completely fails to defer to the interests and expertise of the defendant, but also imposes substantially greater burdens on the defendant than were bargained for under the decree. Such a result can only serve to

discourage defendants from settling institutional reform litigation by consent decree.[6/]

6/ It is significant to note that the Second Circuit's decision in this case not only impacts institutional reform cases in general, but also will have an ongoing effect on the present case in which efforts to modify the decree will undoubtedly be a recurring issue as implementation of the decree continues.

CONCLUSION

For all of the foregoing reasons, petitioners respectfully submit that this Petition should be granted and a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

PETITIONERS:

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In The

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JOHN G. ROWLAND, GOVERNOR
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LINDA D'AMARIO ROSSI, COMMISSIONER,
STATE OF CONNECTICUT
DEPARTMENT OF CHILDREN AND FAMILIES,

Petitioners

v.

JUAN F., ET AL.,

Respondents

APPENDIX

UNITED STATES COURT OF APPEALS

For the Second Circuit

No. 822 August Term 1993

Argued: December 17, 1993 Decided: OCT. 13, 1994

Docket No. 93-7714

JUAN F., by and through his next friends Brian Lynch and Isabel Romero, on behalf of themselves and all others similarly situated; BECKY M., by next friends Barry Kasdan and Edythe Latney; JASON B., by friends George Pipkin and John Leventhal; ANNA R., by friends Cesar Batalla and Julia Ramos Grenier; DOMINIQUE S., by friends Nancy Humphreys and Margaret Penn; PATRICK S., by friends Jerry Reisman and Julia Hamilton; DANIEL C., by friends Patrick Bologna and Cynthia McKenna; FLORENCE J., by friends Michael Rohde and Judith Hyde,

Plaintiffs-Appellees,

- against -

LOWELL P. WEICKER, JR., Governor of the State of Connecticut; ROSE ALMA SENATORE,

Commissioner, State of Connecticut Department of Children and Youth Services,

Defendants-Appellants.

BEFORE: KEARSE and PRATT, Circuit Judges, and Robert J. WARD, District Judge of the United States District Court for the Southern District of New York, sitting by designation.

Appeal from an order particularizing a consent decree entered in the United States District Court for the District of Connecticut, Alan H. Nevas, Judge.

Affirmed.

SUSAN PEARLMAN, Assistant Attorney General for the State of Connecticut (Richard Blumenthal, Attorney General, James P. Welsh, Assistant Attorney General, of Counsel), for Defendants-Appellants.

MARTHA STONE, Hartford, CT, Connecticut Civil Liberties Union

Foundation, for Plaintiffs-Appellees.

PRATT, Circuit Judge:

BACKGROUND

This class action was commenced under 42 U.S.C. §1983 in the United States District Court for the District of Connecticut in December 1989. Plaintiffs are neglected or abandoned Connecticut children. Defendants are Connecticut's Governor and its Commissioner of the Department of Children and Families ("DCF"). Plaintiffs claimed that the structure and administration of Connecticut's child-welfare system violated their federal constitutional and statutory rights in many respects.

From the beginning, the parties and the district court have made extensive and admirable efforts to resolve the parties' disputes through agreement and cooperation. With the parties' consent, and even before defendant had answered the complaint, Judge Nevas appointed a three-member mediation panel consisting of a representative of the plaintiffs, a representative of the defendants, and Senior District Judge Robert C. Zampano. After over five months of concentrated effort that included negotiations between the parties,

public hearings, and extensive deliberations, the panel proposed to the parties and to the court a comprehensive, multifaceted consent decree. The 120-page decree lays out a detailed plan for improving the management, operation, procedures, staffing, and funding of Connecticut's DCF. In January 1991, after a public hearing and with all parties consenting, Judge Nevas approved the proposed decree. The parties and the court then set about implementing the decree, which was designed to restructure a large part of the DCF.

Implementation required development of a manual for each section of the decree. Over a period of 19 months, under the aegis of the mediation panel, the parties developed and stipulated to a total of 12 manuals. Adopted as court orders, the manuals were incorporated as part of the consent decree on September 1, 1992. These manuals are guidelines and handbooks that set forth directives and details concerning the procedures, timetables, additional staffing requirements, funding requirements, and other matters necessary to implement and monitor the mandates in the consent decree. Significantly, the manuals also establish staff qualifications and caseload size for DCF's investigative and treatment personnel.

Because of the difficult issues involved, as well as the importance to the plaintiff class of enforcing the decree, the decree called for extensive monitoring. The

original consent decree, of course, provided that the district court "shall have continuing jurisdiction of this action to ensure compliance with this consent decree." Initially, implementation of and compliance with the provisions of the consent decree were monitored by a monitoring panel, made up of the members of the mediation panel.

After the manuals were issued, however, Judge Nevas on December 1, 1992, signed, with the parties' consent, a detailed monitoring order that transferred both monitoring and the dispute-resolution process from the monitoring panel into the hands of a single, court-appointed, neutral monitor. One provision of the order states, "In monitoring the Decree and Manuals, the Monitor shall focus on patterns of compliance and non-compliance."

Since consenting to the decree and manuals, defendants have continued their cooperative effort to meet the problems of Connecticut's abandoned and abused children and, indeed, many worthwhile changes have been made in the system. One area -- the need for staff increases -- has proved to be particularly sensitive, and it forms the basis for this appeal, the first one in this institutional-reform action, which has been under administration now for four-and-a-half years. Recognizing that increased staffing is essential to DCF's operations, defendants prepared a plan for hiring more social workers and included its cost in the biennial

budget that was submitted to the state legislature in March 1993. That body, however, cut over $8.7 million from the amount that DCF had requested.

Plaintiffs, fearing that this steep cut might undermine the decree's most important provisions, invoked the dispute resolution process provided in ¶IV B of the monitoring order. They alleged that the effect of the budget cuts would be to place DCF in non-compliance in four critical areas: (a) social work and support staffing; (b) hiring of nurse practitioners; (c) payments to foster parents; and (d) program enhancement.

Section IV of the monitoring order provides, in part:

> B. If the Plaintiffs assert that DCYS [DCF] is, or is likely to be in non-compliance with any provision of the Consent Decree, Manuals, or Agreements, they must immediately notify DCYS [DCF] and the Court Monitor in writing. After such notice is given, the parties and Court Monitor shall meet within five (5) working days and attempt to resolve the issue. If the parties and the Court Monitor are not able to reach a timely agreement, then the issue shall be presented to the Trial Judge.
>
> C. If any issue is presented to the Court, the Court Monitor shall certify to the Court in writing the issues to be decided, along with the Court Monitors' recommendations. At the Court hearing, the Court Monitor or any member of his staff may be called as a witness by a party or the Trial Judge.

In such a dispute, therefore, the monitor's function is to investigate the dispute, determine what the issues are, and make recommendations to the district court for their resolution. In this instance, the court monitor held hearings, at which defendants presented oral testimony, and both sides introduced numerous exhibits into evidence. Defendants admitted that the budget cuts would force them into a position of non-compliance, but, in an attempt to avoid imposition of further orders, they presented to the monitor a "revised hiring plan", claiming that the plan would place them in "substantial compliance" with the staffing and foste--parent payment requirements of the decree and manuals. When the monitor issued his "Certification of Issues and Recommendations", he rejected the adequacy of defendants' plan and found that it did "not achieve full compliance or a level of staffing that could be described as 'substantial compliance.'"

All the evidence developed at the hearing before the monitor was presented to Judge Nevas in June, 1993. After considering that evidence and after hearing arguments from counsel, Judge Nevas adopted the monitor's findings of fact and, with some modifications, adopted his recommendations as a court order.

Two aspects of the district court's order are relevant to this appeal. The first is a phased timetable for hiring additional personnel. The manuals provided that various caseload standards must be in effect no

later than June 30, 1994. To achieve those standards new people had to be hired. The order established a schedule for the hirings. It required that by July 1, 1993, DCF hire 145 social workers, 29 social work supervisors, 29 senior clerks, 8 program supervisors, 2 program directors, and 29 case aides, with a second wave, equal in numbers, to be hired by January 1, 1994. The new timetable and number of social workers to be hired had been taken from DCF's own budget request previously submitted to the state legislature.

The second aspect of Judge Nevas's order relevant to the appeal is a requirement that defendants reimburse foster parents 100% of the United States Department of Agriculture (USDA) foster parent rates by July 1, 1994. Section XV(C)(9) of the consent decree requires DCF, under the direction and with the approval of the monitoring panel, to "develop and implement schedules and conditions for reimbursement to foster parents at one hundred percent of USDA foster parent rates". Those rates are set periodically by the Department of Agriculture and represent an amount needed to reimburse foster parents for expenses incurred for housing, food, clothing, and the expenses associated with providing foster care. The effect of Judge Nevas's order was to set a specific date for achieving the 100% level required by the decree.

DISCUSSION

While defendants concede that the legislative cuts imposed on the DCF budget rendered them unable to achieve timely full compliance with the consent decree and manuals, they principally argue on appeal that: (1) Judge Nevas erred because he modified their legal obligations merely on the basis of predictions of prospective noncompliance, without actually finding any constitutional violation; (2) their proposed "substantial" compliance was sufficient to avoid judicial intervention by the court; (3) Judge Nevas could not adopt the facts found by the court monitor; and (4) Judge Nevas's order violated due process, because he did not provide defendants with a "fair hearing."

We have carefully considered all of defendants' contentions on this appeal in light of the history and importance of this significant litigation, and we find no basis for reversing Judge Nevas's order. Because of the public significance of this matter, and because it is likely that the parties will continue for some time to operate under this consent decree as implemented and modified by the manuals and the monitoring order, we write at some length so that the parties, the monitor, and the district court can be properly guided as they continue their cooperative efforts to improve Connecticut's child-welfare system.

1. "Modification" of the Decree.

Defendants argue that under general standards governing modification of consent decrees, the district judge erred because his order increased defendants' obligations beyond what they had consented to in the decree.

Consent decrees have a dual nature: they blend a court order with the parties' agreement. Consent decrees, of course, are injunctions, and their modification is reviewed under an abuse-of-discretion standard. Lorain NAACP v. Lorain Board of Education, 979 F.2d 1141 (6th Cir. 1992). Modification is a remedy not to be lightly awarded, "especially where the design is not to relieve a party of obligations but to impose new responsibilities." Walker v. HUD, 912 F.2d 819, 826 (5th Cir. 1990). "A contrary rule would discourage compromise for fear of adverse judicial modification." Id.

Consent decrees are also contractual, and while they "should be construed basically as contracts, without references to the [claims the plaintiffs] originally sought to enforce but never proved applicable through litigation," United States v. ITT Continental Baking Co., 420 U.S. 223, 236-7 (1975), in implementing the purposes of a decree, a court is not rigidly confined only to the terms contained within the four corners of the parties' agreement.

In institutional-reform litigation a more flexible standard may be applied when modifying a consent decree. Rufo v. Inmates of Suffolk County Jail, 112 S. Ct. 748 (1992). In Rufo, the court noted that the "upsurge" in reform litigation involving governmental institutions "has made the ability of a district court to modify a decree in response to changed circumstances all the more important." Id. at 758. The court added that "the public interest is a particularly significant reason for applying a flexible modification standard in institutional reform litigation." Id. at 759. Under this standard, a party may obtain modification of a consent decree by establishing that there has been a significant change in circumstances, factual or legal, and that the proposed modification is suitably tailored to deal with the changed circumstances. Id. at 760.

In this case, there has been no modification of the decree. The court monitor recommended, and the court ordered, that the original commitment to achieve certain caseload levels by a given date should be assured by staggering the new appointments over the remaining time so that by the time the agreed date was reached, the necessary new hires could be placed and trained, ready to handle the cases. Rather than modifying the decree by increasing defendants' obligations, as defendants claim, the court order in this case simply ensured compliance with the time frame originally established by the manuals.

Significantly, just this kind of amplification and specification had been anticipated by the parties and the court. In the first place, explicit language in the decree gave the court authority to issue orders to ensure compliance. "This court shall have continuing jurisdiction of this action to ensure compliance with this Consent Decree." Decree, ¶II(16). See also Berger v. Heckler, 771 F.2d 1556, 1568 (2d Cir. 1985) ("Consent decrees are subject to continuing supervision and enforcement by the court").

Moreover, the monitoring order, agreed to by defendants, established a dispute-resolution process anticipating that the monitor, and eventually the court, would intervene, not just in cases of actual noncompliance, but also when plaintiffs showed that DCF was "likely" to be in noncompliance. Working under that procedure, the monitor investigated here and found that the defendants simply could not be in full compliance with the required hiring and training of caseworkers unless the court imposed the deadlines that he recommended. We therefore reject defendants' claim that the district court's order violated the legal principle that a party may not be held, under the guise of modification, to more onerous terms than those agreed to in a consent decree. This order was not a modification; it was designed to ensure full compliance with the original decree, and implementing the decree

in this fashion was not an abuse of the district court's discretion.

Even if the June 25th order were to be viewed as a modification of the decree, we would still conclude, by applying the flexible Rufo standard, that the district court did not abuse its discretion. In the first place, we reject defendants' suggestion that the Rufo standard for flexible modification can benefit only defendants seeking relief from burdensome requirements. Rufo's flexibility is designed to permit details in complicated decrees, much as this one, to be adapted to changing conditions so that the public interest can be preserved. As the Court noted, "[m]odification is * * * appropriate * * * when enforcement of the decree without modification would be detrimental to the public interest." Rufo, 112 S. Ct. at 760. The failure of Connecticut's General Assembly to grant the funds requested by DCF constitutes a significant enough factual change to justify the changes ordered by the district court. Those modifications were necessary to ensure timely implementation of the decree and provide for the plaintiff class the protections and services originally agreed to by the parties and ordered by the court.

2. Substantial Compliance.

Defendants also argue that the district court erred in particularizing the hiring schedule, because the defendants were at least in substantial compliance with the decree. However, the decree does not contemplate anything less than 100% compliance with the caseload standard, and as already noted, the district court's order merely required specific numbers of new hires and a graduated hiring timetable, found to be necessary in order to ensure full and timely compliance. Defendants' argument of substantial compliance might become relevant if ever there should be a hearing for contempt based on claimed noncompliance by defendants. U.S. v. Commonwealth of Massachusetts, 890 F.2d 507, 509 (1st Cir. 1989)(establishing as the test in contempt proceedings, "whether the objectives of the decree have been substantially achieved"). "Substantial compliance" has no bearing, however, on the district court's power to interpret the decree and, when necessary, to make its terms more precise and realistic.

3. Monitor's Factfinding.

DCF claims that the monitor was not authorized to make findings of fact, but even if he were, the district court erred because it did not make its own independent findings, but instead adopted the monitor's report without addressing DCF's objections or

permitting DCF to present evidence about its efforts to comply with the decree.

The powers of the court monitor are set forth in the district court's monitoring order of December 1, 1992. It states that the court monitor "shall be responsible to the Trial Judge, but shall work actively with the parties to ensure timely and effective compliance of the provisions of the Consent Decree." To carry out these duties and responsibilities, "the Monitor is empowered to take any and all action to effect timely compliance * * *." Specifically, he is empowered to monitor implementation and compliance, to convene a meeting of the parties, establish a reporting structure that "enables the monitor to effectively assess the progress of the implementation of the Juan F. Consent Decree," obtain information from DCF, issue compliance reports, attempt to resolve disputes, and "review requests by either party for modification * * *, and if necessary, to make a recommendation to the Trial Judge regarding the request for modification." If the monitor cannot resolve a dispute between the parties, then he must "certify to the Court the issues to be decided" and must also submit his own recommendations for their resolution.

Obviously, the monitor could not do many of these things without making an investigation and determining what are the essential facts that guide his analysis and recommendations. In this case, to determine what it

was that plaintiffs were complaining about, the monitor held a lengthy evidentiary hearing, made findings of fact, and then certified the issues and his recommendations to the district court -- all in order to effect timely compliance with the provisions of the decree.

As to what kind of judicial officer the "court monitor" is, it seems apparent that he is a special master, albeit by another name. Like a special master, who is subject to the limitations of the order of reference, the court monitor has the power to hold meetings, request information, issue reports, hear evidence, and issue findings of fact. See F.R.C.P.53(c). A special master's findings are entitled to deference. "In an action to be tried without a jury the court shall accept the master's findings of fact unless clearly erroneous." F.R.C.P. 53(e)(2). Because of the similarity in the roles of the court monitor and a special master, we think it proper to apply the same "clearly erroneous" standard to the monitor's findings of fact. Here, the monitor's findings of fact were not clearly erroneous. Defendant had conceded that they could not fully comply with the provisions in the decree, and the monitor's findings, analysis, and recommendations to the district court, all based on ample evidence, did no more than ensure compliance with the decree, by making more specific the dates when stages in the compliance plan should be achieved.

While defendants object to the district court's having deferred to the "findings" that underlay the monitor's "recommendations", it seems apparent that the parties considered the hearing that the monitor conducted over a three-day period to be, in effect, a trial. The parties made opening statements; they placed documents in evidence; they entered into formal stipulations of fact; a court reporter kept a verbatim record of the proceedings; defendants called four witnesses to testify, placed them under oath, and subjected them to direct examination, followed by cross and redirect examination; and both sides presented legal arguments. The issues were thus made clear, and ultimately the court monitor filed his report and recommendations with the district judge. The parties' actions demonstrate their understanding that a trial was being held and that at the conclusion of the trial the court monitor was going to report to the district judge his analysis of the issues and recommendations, including the facts on which they were based.

4. Due Process.

Defendants contend that "[d]ue process required the court to hold a hearing before ordering the defendants to perform certain obligations not previously agreed to." (emphasis added). Of course, as we have already pointed out, the court's order did not require

defendants to perform any new obligations; it merely made more precise and realistic the required performance of obligations that defendants had already undertaken.

With respect to defendants' claim that a fuller hearing was required before the district court, defendants specifically complain abut not having been able to present new evidence to the district judge. The district judge, however, asked for and received a proffer of the proposed new evidence, and he properly determined that it was irrelevant. Commissioner Senatore's proposed testimony about implementation of defendants' "revised hiring plan" did not relate to what was needed for compliance; instead, it sought to show that defendants had already achieved "substantial compliance", which as we demonstrated above, would be relevant only with respect to a possible contempt sanction, not in issue on this appeal.

We note in passing that Commissioner Senatore and three other defense witnesses had testified at the hearing before the monitor. To require the district judge to hear again the testimony of these and perhaps other witnesses would circumvent and undercut the work of the court monitor who, under the consent decree as modified by the monitoring order, is the centerpiece of the alternative-dispute-resolution process which so far has functioned so well in working out this complex dispute.

The entire transcript of the hearings before the monitor, the exhibits that had been admitted into evidence, the stipulations of fact, and the monitor's recommendations were all before the trial judge for his review and consideration. We conclude that the defendants were not denied due process by these procedures, which properly and effectively carried out the intent of the consent decree and the monitoring order.

CONCLUSION

Resolution of this complex case by consent decree would not have been possible without the admirable cooperation of the parties and the careful, diligent work of the court monitor. Their joint efforts have effectively addressed over one-hundred issues that plaintiffs have advanced in their broad-scale challenge on behalf of Connecticut's foster care and adoptive children. Because of the parties' cooperation, wisdom, and good faith displayed so far in dealing with these important problems, lengthy and expensive formal judicial proceedings have been avoided, and relief to the plaintiff class has been expedited. We fully expect that the same attitudes will continue to prevail as the parties, the court monitor, and the district court continue to wrestle with the problems that still remain to be resolved under the consent decree.

We affirm the order appealed from, but of course recognize that the district court and the parties may find it necessary to modify the originally ordered compliance dates in order to compensate for the time necessarily lost in processing this appeal.

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

X

JUAN F., by and	:	
through his next	:	Civil H-89-859 AHN
friends Brian Lynch	:	
and Isabel Romero, on	:	
behalf of themselves	:	
and all others	:	
similarly situated,	:	
et al.,	:	
Plaintiffs,	:	June 25, 1993
V.	:	
WILLIAM O'NEILL, et al.:		915 Lafayette Boulevard
	:	Bridgeport, Connecticut
Defendant.		

---X

B E F O R E :

THE HONORABLE ALAN H. NEVAS, U. S. D. J.

A P P E A R A N C E S :

FOR THE PLAINTIFFS:

MARTHA STONE, ESQ.
SHELLY GEBALL, ESQ.

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THE COURT MONITOR:

DAVID J. SULLIVAN, JR.
DCYS Monitoring Panel
746 Chapel Street
New Haven, Connecticut 06510

Susan E. Catucci, RPR-CM
Official Court Reporter

MS. PEARLMAN: Yes, well, I would just ask Your Honor to take sometime to read that objection.

(Pause.)

THE COURT: All right, the court is prepared to rule. I've indicated earlier today that it seems to me that the position of the Department is one of good faith and a conscientious effort to comply with not only the letter but with the spirit of the consent decree. From what I understand, they have done that. Mr. Sullivan indicated in his opening remarks that he's received excellent cooperation from the Commissioner and members of her staff and her department, and he made it very, very clear that he does not fault her or the Department in any way for the problems that have developed. It's clear that the Department made a very good faith effort to obtain the level of funding that they honestly thought was necessary to bring them into compliance with the consent decree and they were thwarted in that effort by the General Assembly which reduced their budget by approximately nine million dollars.

So the problem here is one that was created by the General Assembly and, as I said before, the General Assembly is going to have to solve the problem. I do not relish the possibility of some kind of confrontation between this court and the General Assembly. I fully expect it will not come to that. But I will say in all candor and honesty that the decrees and judgments of

this court will be carried out. The purpose of the Court Monitor and creation of that position was and is to provide a methodology and vehicle for these kinds of problems and issues to be incurred and resolved, if they could not be resolved through the efforts of The Monitor himself by virtue of mediation or otherwise, he's empowered to conduct hearings, make findings and recommendations to the court. And he has done so. I do not intend to engage in lengthy hearings to determine the wisdom or lack thereof of his findings and recommendations. I have confidence in The Monitor and until I am persuaded otherwise, I will continue to rely on his services to deal with issues such as these.

Therefore, I am accepting the recommendation of The Monitor and I am ordering that the Juan F. consent decree be amended to add a subparagraph six which will read, as set forth on page 26 of The Monitor's Certification of Issues and Recommendations, which is Docket Number 169 in this case as amended by his remarks today, that is, with respect to 6d, small D in other words, which would be eight program supervisors on July 1st, '93 and eight program supervisors on January 1, '94. In addition, the Department is ordered to hire six nurse practitioners by July 1, 1993, in accordance with the terms of the decree.

With respect to the issue of F.D.A. reimbursement, I think in that regard, based on the

representation to the court of Miss Pearlman that the current rate of reimbursement is at 92 percent, I'm going to order the Department to raise that level of reimbursement to 95 percent by January 1 of 1994, and to one hundred percent by July 1st of 1994.

Anything further? Miss Stone.

MS. STONE: I'm sorry, just one last point, Your Honor. I believe that there was a second part on that which was a hundred percent of then current U.S.D.A. rates and that was an important phrasiology that needs to be clear in your order.

MS. PEARLMAN: Your Honor, the Department always interpreted that as the last published U.S.D.A.and so -- and the U.S.D.A. is usually -- right now we have the '92 U.S.D.A.; that's the last published U.S.D.A.

THE COURT: Well, I think the recommendation of the Monitor was --

MS. STONE: On page 23, Your Honor, just that second sentence -- I have it, and he's recommending that the court amend the consent decree related to foster care reimbursement rates at, and then he gives a citation at the bottom of page 22 by adding language which is set out at the top of page 23 of his report and I've changed that date, so that the language of that suggest amendment by the Monitor would have to be changed to reflect my change and you're now talking about in the next sentence such rates --

MS. PEARLMAN: Where it says current U.S.D.A. rates, we believe that current U.S.D.A. rates should indicate current, meaning the last published one. That's the only one that is current.

MS. STONE: His language is acceptable to us, Your Honor. I just wanted to make sure that was included.

THE COURT: But what do we mean by current? Miss Pearlman is making the point how do you establish what the current U.S.D.A. rates are? She's saying the only way to establish them are those that are published.

MS. STONE: I understand that, Your Honor.

THE COURT: All right. Well, then I would suggest that that be clarified so that when you say the most current U.S.D.A rates, you indicate either parenthetically or otherwise what you're talking about.

All right. Anything further? Miss Stone?

MS. STONE: No, Your Honor. Thank you.

THE COURT: Miss Pearlman?

MS. PEARLMAN: No, Your Honor.

THE COURT: All right. Stand in recess.

(Whereupon, the above matter was adjourned at 3:05 o'clock, P.M.)

CERTIFICATE

I, Susan E. Catucci, hereby certify that the foregoing 60 pages are a complete and accurate transcription of my original stenotype notes taken in the matter of Juan F., et als v. William O'Neill, et al, Civil Docket No. H-89-859 AHN, which was held before the Honorable Alan H. Nevas, U.S.D.J., at 915 Lafayette Boulevard, Bridgeport, Connecticut, on June 25, 1993.

Susan E. Catucci, RPR-CM
Official Court Reporter

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
UNITED STATES COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

George Lange, III
Clerk

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 23rd day of January on thousand nine hundred and ninety-five.

Juan F., by and through his best friends Brian Lynch and Isabel Romero, on behalf of themselves and all others similarly situated; ET AL., [seal]

Plaintiffs-Appellees,

v. Dkt No: 93-7714

Lowell P. Weicker, Jr., Governor of the State of Connecticut; ET AL.,

Defendants-Appellants.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by the appellants Lowell P. Weicker, Jr., and Rose Alma Senatore.

Upon consideration by the panel that decided the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT

GEORGE LANGE III,
Clerk

By: /s/
Carolyn Clark Campbell
Chief Deputy Clerk

p o ccc
inbancdn_frm

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

JUAN F., by and	:
through his next	:
friends Brian Lynch	:
and Isabel Romero,	:
on behalf of themselves	:
and all others similarly:	
situated, et al.	:
v.	:Civil No. H-89-859 (AHN)
WILLIAM O'NEILL, et al.	:Honorable Alan H. Nevas

Monitor's Certification of Issues and Recommendations

June 15, 1993

Recommendations

Despite the considerable efforts of the Department since the December 1, 1992 Monitoring Order, the issues raised by this complaint are specific and involve the very heart of the Juan F. Consent Decree.

The Juan F. v. O'Neill Consent Decree was negotiated and agreed upon by all the parties and formally approved by this court after a thorough consideration of the constitutional and statutory issues raised by the action brought on behalf of the Plaintiffs. As a direct result of this Consent Decree the Juan F. Manuals were written and agreed upon by the Parties and their designated representatives and approved by this court.

Broadly stated, this Consent Decree and its Manuals have as their purpose the correction of a situation in which abused, neglected, abandoned, and at-risk children within the State of Connecticut were deprived of certain constitutional and statutory rights.

The Consent Decree and its Manuals impose upon the DCYS and the State of Connecticut the responsibility for the care of these children and the duty of correcting this situation.

If the DCYS is to meet this obligation, it is imperative that it be empowered to hire personnel in numbers sufficient to meet the caseload standards and resultant staffing requirements set forth in the Consent Decree and its Manuals.

If the action of the General Assembly in refusing to fund these mandated staffing levels is allowed to stand unchallenged, the children whose constitutional and statutory rights have been violated in the past will face a further unexcusable delay in the remedy of this situation. Increasingly, many of the children will be placed in clear and present danger of irreparable harm.

The Intake and Investigations Manual, §X., A., 3., p. 46; The Quality Assurance Manual, §XIII., ¶A., 1., 2.; The Central and Regional Office Manual, §IX., ¶B., 3.; the Adoption Manual, §I., A., 1.; and the Treatment Unit Manual, §II., A., 2., each mandate July 1, 1994 as the date by which the Department of Children and Youth Services shall comply with the caseload standards spelled out in the Juan F. Consent Decree. If

compliance enforcement is delayed until July 1, 1994, the children who constitute the protected class will be denied the protection and benefits which is theirs under the United States Constitution and federal statutes and the Juan F. Consent Decree.

Accordingly, pursuant to Section XXVI of the Juan F. Consent Decree and Section IV of the December 1, 1992 Monitoring Order entered by this court, the Monitor recommends to the court that Section VIII, ¶(B) of the Juan F. Consent Decree be amended to add subparagraph (6) to read as follows:

(6) The Department of Children and Youth Services (DCYS) shall hire social workers, social work supervisors, senior clerks and case aides according to the following number of positions and timelines:

(a) 145 social workers on July 1, 1993 and 145 social workers on January 1, 1994;

(b) 29 social work supervisors on July 1, 1993 and 29 social work supervisors on January 1, 1994;

(c) 29 senior clerks on July 1, 1993 and 29 senior clerks on January 1, 1994;

(d) 8 program supervisors on July 1, 1993 and 8 program supervisors on January 1, 1994;

(e) 2 program directors on July 1, 1993 and 2 program directors on January 1, 1994, and;

(f) 29 case aides on July 1, 1994 [sic] and 29 case aides on January 1, 1994.

Respectfully Submitted,

By: /s/

David J. Sullivan, Jr.
Court Monitor
DCYS Monitoring Panel
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New Haven, CT 06510

CERTIFICATION

This is to certify that a copy of the foregoing was mailed postage prepaid on June 15, 1993 to the following counsel of record:

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/s/
David J. Sullivan, Jr.
Court Monitor

No. 94-1731

Supreme Court, U.S.
FILED
MAY 24 1995
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

JOHN G. ROWLAND, *et al.*,

Petitioners,

—v.—

JUAN F., BY AND THROUGH
HIS NEXT FRIENDS, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Did the Second Circuit follow the applicable rulings of *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561 (1984), and *Rufo v. Inmates of the Suffolk County Jail*, 502 U.S. 367 (1992), in affirming the broad equitable power of the district court to enforce the Consent Decree it had been supervising for over four years?

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COUNTERSTATEMENT OF THE CASE

The children who are plaintiffs in the district court and respondents to this petition filed their lawsuit to challenge Connecticut's failure to protect its most vulnerable citizens -- the thousands of abused and neglected children dependent on the state's foster care system for care and protection. A 120-page "comprehensive, multi-faceted" Consent Decree was approved by the district court on January 7, 1991. Petitioners' Appendix 4-A.[1]

The Consent Decree required the development of manuals for each of its sections. Twelve manuals, containing both substantive provisions as well as timetables, were stipulated to by the parties and incorporated as part of the Consent Decree by the district court on September 1, 1992. Pet. App. 4-A.

Because of its complexities, and the importance of implementation, the Decree provided for continuing jurisdiction by the district court to ensure compliance. A subsequent detailed Monitoring Order was also issued by the district court on December 1, 1992, placing monitoring and a dispute resolution process in the hands of a court-appointed neutral monitor. Pet. App. 5-A. An essential provision of this Order, ignored by petitioners in their statement of the case, authorized intervention by the Monitor and the court not only on issues of noncompliance, but also on issues of *anticipated* noncompliance. Pet. App. 6-A.

The provisions of the Decree and Manuals relating to caseload reduction were one of the key linchpins of the Decree and imposed upon petitioners explicit caseload/staffing ratios and deadlines by which such ratios were to be reached. Pet. App. 4-A, 8-A. With the knowledge she had

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[1] Petitioners' Appendix, hereinafter referred to as "Pet. App."

a court-ordered date of July 1, 1994 to achieve full compliance on these issues, petitioner Commissioner of the Department of Children and Families (DCF) developed budget requests to hire 145 social workers, 29 social work supervisors, 29 senior clerks, 8 program supervisors, 2 program directors, and 29 case aides by July 1, 1993, and an equal number of each category by January 1, 1994. Pet. App. 8-A.[2] These requests were submitted to the legislature and the Court Monitor as the agency's formal plan for necessary staffing to meet court-mandated requirements. Pet. App. 8-A.

Despite the knowledge that any reductions would force DCF to be out of compliance with federal court orders, the Governor approved DCF's budget from which the Connecticut legislature had slashed millions of dollars for staffing positions. Indeed, the budget, as eventually signed by the Governor, contained 173 *fewer* social workers and 133 *fewer* social work supervisory and support staff than was required for compliance of the Decree and manuals. Appendix 7a.[3]

In order to protect their rights, respondents invoked the dispute resolution process provided in ¶IV.B of the Monitoring Order, Pet. App. 6-A, alleging that the budget cuts would place DCF in noncompliance of the Decree.[4] Pursuant to his explicit authority under the Monitoring Order, the

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[2] Because of the comprehensiveness and time requirements of training and the restriction on new trainees from carrying a full caseload immediately, the hiring needed to occur well in advance of the July 1, 1994 deadline. Pet. App. 11-A.

[3] Appendix attached hereto, and hereinafter referred to as "App."

[4] Petitioners have now abandoned their appeal of claims relating to increased foster care payments, and nurse practitioner staffing, which were part of the original orders.

Monitor held extensive hearings over a three-day period during which petitioners made a significant concession -- the budget cuts would force them unequivocally into a position of noncompliance. Pet. App. 7-A. While they claimed that a "revised hiring plan" would place them in "substantial" compliance, the Monitor rejected their factual assertions, explicitly ruling that the plan did "not achieve full compliance *or* a level of staffing that could be described as 'substantial compliance.'" Pet. App. 7-A[5] (emphasis added). On June 15, 1993, the Court Monitor issued recommendations to the district court that it order the hiring plan initially put forth by DCF in order to prevent "clear and present danger of irreparable harm" to respondents. Pet. App. 32-A.

At a subsequent court hearing on June 25, 1993, the full transcript of testimony and argument, as well as the documentary evidence from the hearings before the Monitor, were presented to the district court. The district court, after considering this evidence and hearing argument from the Monitor and the parties, adopted the Monitor's findings of fact and recommendations with minor modifications.[6]

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[5] The Court Monitor "disregarded" their "revised" plan, Pet. Br. p.4, precisely because it still left DCF with *58* fewer social workers and *133* fewer social work support staff than were needed to meet the July 1, 1994 caseload mandates. App. 5a, 7a. He also found that adequate funding of this plan was "questionable" and did not "address the continuation of any positions established in this *ad hoc* manner since they [were] not presently included in the SFY 94-95 budget." App. 5a. Furthermore, he recognized the numbers in this alleged "revised plan" were significantly less than the petitioners had represented they needed only a few weeks earlier. App. 5a, 6a.

[6] The court changed the number of program supervisors required to "eight" by July 1, 1993 and "eight" by January 1, 1994. Pet. App. 24-A.

REASONS FOR DENYING THE WRIT

This case presents no conflict with the rulings of this Court or of other courts of appeals as to the proper construction or modification of institutional reform consent decrees. The Second Circuit Court of Appeals correctly concluded that the district court's specific order detailing what additional steps petitioners had to take to come into compliance with certain staffing requirements in the consent decree and manuals was not a modification, but rather a permissible enforcement of the express terms of the parties' agreement in accordance with *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561 (1984). Even if the district court's clarification can be construed as a modification, the court of appeals correctly applied the proper standard of modification in conformity with this Court's ruling in *Rufo v. Inmates of the Suffolk County Jail*, 502 U.S. 367 (1992), and other applicable precedents. Respondents therefore respectfully urge this Court to deny the petition for a writ of *certiorari*.

I. THERE IS NO CONFLICT AMONG THE CIRCUITS AS TO THE PROPER STANDARD FOR CONSTRUING CONSENT DECREES

The legal issue in this case can be simply stated. Petitioners voluntarily entered into a consent decree under which they agreed to meet certain caseload and staffing ratios by July 1, 1994. The consent decree further provided that the district court could resolve issues of anticipated noncompliance before they matured into full-scale problems that jeopardized the essential purposes of the decree. Pursuant to this authority, the district court ordered petitioners to hire, in advance of the July 1st deadline, a designated number of child care workers that the state itself had determined would be necessary to ensure compliance with its staffing obligations.

Petitioners challenge that order as an inappropriate exercise of judicial authority. As the Second Circuit correctly held, however, the challenged order did not enlarge or modify the terms of the consent decree. It merely implemented a provision of the agreement that the state had previously accepted and now sought to disavow. The district court's implementation order was well within its equitable discretion and the Second Circuit's affirmance of that order was entirely consistent with this Court's applicable precedents and the prevailing law in other circuits. Accordingly, review by this Court is neither necessary nor warranted.

A. The Second Circuit's Decision Is Consistent With This Court's Ruling In *Stotts* And The Approach Followed By Other Courts Of Appeals

Petitioners' assertion that a conflict exists between the Second Circuit's decision below and this Court's ruling in *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561, is based on a fundamental misreading of the Second Circuit's ruling. By suggesting that the court went beyond the four corners of the parties' agreement and adopted an overly broad standard for implementing the decree, petitioners confuse the court's distinction between the proper inquiry for *construing* a consent decree and the scope of a court's authority to insure *implementation* of a decree. While consent decrees should be "'*construed* basically as contracts'" with reference only to its express terms, courts are not confined within the four corners of the parties' agreement in "'*implementing* the *purposes* of the decree.'" *Juan F. by and through Lynch v. Weicker*, Pet. App. 10-A (quoting *United States v. ITT Continental Baking Co.*, 420 U.S. 223, 236-37 (1975))(emphasis added).

This language is entirely in accord with this Court's ruling in *Stotts*. Applying the "four corners" rule of construc-

tion developed in *United States v. Armour & Co.*, 402 U.S. 673, 681-82 (1971), this Court in *Stotts* concluded that the injunction of the fire department's seniority policy could not be considered a permissible enforcement of the terms of the parties' agreement because: (1) there were no express layoff provisions within the four corners of the consent decree, and (2) the injunction involved a qualitatively different remedy which required a consideration of other factors which were not dealt with in the original consent decree. 467 U.S. at 574-75.

Here, by contrast, the district court's order implemented a series of caseload and staffing ratios that were expressly included within the four corners of the consent decree. Unlike *Stotts*, therefore, this case does not involve a district court order addressing issues that the parties themselves had never contemplated. Indeed, precisely the opposite is true. The challenged order in this case did not alter the basic agreement between the parties; it simply ensured that the agreement was honored.

Moreover, the Second Circuit's decision comports with its prior rulings,[7] as well as established precedents in other circuits. Despite petitioners' attempt to create a false conflict among the circuits by summarily referring to *Lorain NAACP v. Lorain Board of Education*, 979 F.2d 1141 (6th Cir. 1992), *cert. denied*, __ U.S. __, 113 S.Ct. 2998 (1993); *Halderman v. Pennhurst State School and Hospital*, 901 F. 2d 311 (3d Cir.), *cert. denied*, 498 U.S. 850 (1990); and

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[7] While petitioners cite the Second Circuit's decision in *Crumpton v. Bridgeport Education Association*, 993 F.2d 1023 (2d Cir. 1993), as also conflicting with its decision in *Juan F.*, that decision provides no independent support for petitioners' argument. Applying the contract theory of construction, the court determined that, in the absence of a specific layoff provision, a preferential layoff plan was not within the four corners of the parties' agreement.

San Francisco NAACP v. San Francisco Unified School District, 896 F.2d 412 (9th Cir. 1990), close scrutiny of these cases shows no inconsistency with the four corners rule for construing consent decrees followed by the Second Circuit.[8]

In fact, *Lorain* does more than merely fail to support petitioners' contentions -- it contradicts them by squarely recognizing that "the courts, in *effectuating* the purposes or accomplishing the goals of a decree, are *not* bound under all circumstances by the terms contained within the four corners of the parties' agreement." 979 F.2d at 1148 (emphasis added). *See also United States v. Knote*, 29 F.3d 1297, 1300 (8th Cir. 1994)(quoting *ITT*, 420 U.S. at 243) ("even when interpreting the meaning of a consent decree 'as written,' we are not to ignore the context in which the parties were operating, nor the circumstances surrounding the order"); *E.E.O.C. v. Local 580*, 925 F.2d 588, 593 (2d Cir. 1991) ("though a court cannot randomly expand or contract the

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[8] In *Lorain*, the decree actually contained an express provision limiting the state's financial obligations to $1 million, and so the Board of Education's attempt to increase the State's obligation to $9 million was held beyond the scope of the parties' agreement. Because the revision was contrary to the original provision governing the state's obligations, *Lorain* is clearly distinguishable from the case at hand.

In *Halderman*, the Third Circuit held that, under the contract theory of interpretation, termination of an express provision granting the court "active jurisdiction" over the settlement did not deprive the court of permanent jurisdiction to enforce the settlement under a different provision of the agreement. This case hardly advances petitioners' argument.

In contrast to the staffing provision in the present case, the terms of the reimbursement provision in *San Francisco NAACP* were expressly limited by a funding provision linked to the California Code. When new legislation in the Code reduced the state's financial obligations, the court bound the parties to this reduction according to the original terms of the provision under the four corners rule.

terms agreed upon in a consent decree, judicial discretion in flexing its supervisory and enforcement muscles is broad").

B. The Second Circuit Correctly Applied The Law On The Construction Of Consent Decrees

While the Consent Decree and Manuals expressly provided that the staff of DCF be increased through compliance with specific caseload ratios, the trial court's translation of this requirement into an exact mathematical figure with phased-in hiring dates not only falls within the four corners of the parties' agreement, but it represents the very heart of the agreement. Rather than imposing new terms, the subsequent order sought to achieve compliance with the exact same staffing requirements already agreed upon by the parties in the Decree and Manuals. The only qualitative difference between the initial staffing requirements and the subsequent order was to make explicit what was already implicitly necessary to place the State in full and timely compliance.[9] Only after petitioners admitted that they would not be in full compliance because of the funding cuts did the court undertake to impose orders to "effectuate the purposes" of the Decree. This fine tuning, in conformity with the nature of the requirements, was neither an enlargement of nor an addition to petitioners' obligations. Rather, it was an entirely proper construction of the state's basic obligation under the Consent Decree which merely reinforced the plain meaning of the parties' agreement.

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[9] For example, it takes about six months before a social worker can be hired and given the necessary training under the Decree to assume a caseload. App. 6a. Since the Department had already interviewed 100 persons who had been cleared for hiring, App. 2a, 3a, there was no undue burden placed on petitioners, and their alarmist arguments, Pet. Br. at 11, create a distortion of the record.

Upon determining that the staffing provisions were properly within the scope of the Consent Decree and that action to compel compliance was required, the court of appeals did not err in affirming the district court's findings. Not only was the district court exercising its affirmative duty to protect its decree pursuant to its broad equitable powers provided by the explicit provision granting it "continuing jurisdiction of this action to ensure compliance," Pet. App. 12-A,[10] but its orders were issued pursuant to a specific dispute resolution procedure explicitly contemplated in the Monitoring Order.

II. THERE IS NO CONFLICT AMONG THE CIRCUITS AS TO THE PROPER STANDARD FOR MODIFYING INSTITUTIONAL CONSENT DECREES

A. The Second Circuit's Decision Is Entirely Consistent With This Court's Ruling In *Rufo* And The Sixth Circuit's Decision In *Lorain*

To the extent that the district court's order is construed as a modification of the parties' agreement, petitioners contend that the Second Circuit's decision below conflicts with this Court's ruling in *Rufo v. Inmates of the Suffolk County Jail*, 502 U.S. 367, and the Sixth Circuit's decision in *Lorain NAACP*, 979 F.2d 1141, by impermissibly applying the flexible modification standard to increase, rather than decrease, the state's burden.

As a preliminary matter, the modification standard articulated in *Rufo* is inapplicable to the present case. In *Rufo*,

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[10] *See also Brown v. Neeb*, 644 F.2d 551, 558 (6th Cir. 1981), concluding that the district court had broad authority to enter orders to achieve and ensure compliance under a similar provision.

modification was sought by the defendants. Here, if any modification has taken place, it is plaintiffs who are seeking revision of an institutional consent decree. The courts have recognized this distinction as a significant one and have approved modification requests made by plaintiffs "'if the original purposes of the injunction are not being fulfilled in any material respect'" (citation omitted), and "additional injunctive relief is necessary to advance those purposes." *United States v. Local 560 (I.B.T.)*, 974 F.2d 315, 331-32 (3d Cir. 1992). This rule, derived from this Court's decision in *United States v. United Shoe Machinery Co.*, 391 U.S. 244, 247-49 (1968), applies an even more relaxed standard than that announced in *Rufo*, because of the need for a district court, based upon *fact-specific* circumstances, to exercise its power "to prescribe other, and if necessary more definitive, means to achieve the [intended] result." 391 U.S. at 252. *See also Sizzler Family Steak Houses v. Western Sizzlin Steak House Inc.*, 793 F.2d 1529, 1539, *reh'g denied*, 797 F.2d 982 (11 Cir. 1986); *Exxon Corp. v. Texas Motor Exchange of Houston, Inc.*, 628 F.2d 500, 503 (5th Cir. 1980).

Alternatively, the Second Circuit correctly held that, even under the standard advanced by *Rufo*, modification was necessary to prevent detriment "to the public interest," because the funding cuts had frustrated the implementation of the staffing requirements.[11] Pet. App. 13-A.

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[11] The monitor's recommendation states, in relevant part:

> If the action of the General Assembly in refusing to fund these mandated staffing levels is allowed to stand unchallenged, the children whose constitutional and statutory rights have been violated in the past will face a further unexcusable delay in the remedy of this situation.

Pet. App. 32-A.

Nor does the Second Circuit's ruling conflict with *Lorain*. The Sixth Circuit had reversed the lower court's ruling because it had essentially ignored the original terms of the consent decree and substituted new, entirely different terms that bore no relationship to the original parties' intent. That court went on to warn that modification would be appropriate in circumstances similar to the present case "'if it furthers the original purpose of the decree in a more efficient way, without upsetting the basic agreement between the parties.'" 979 F.2d at 1149 (citation omitted).

B. There Is No Conflict Among The Circuits

The Second Circuit's decision is similarly reconcilable with applicable rulings by other courts of appeals. Those circuits that have addressed the issue of modification of institutional consent decrees subsequent to *Rufo* and *Lorain* have not limited the relaxed modification standard to revisions which seek only to ease the states' burden. In *Vanguards of Cleveland v. City of Cleveland*, 23 F.3d 1013 (6th Cir. 1994), the Sixth Circuit held that a significant public interest in fulfilling the goals of the consent decree constituted a change in circumstances warranting modification under *Rufo*. Similarly, the Third Circuit, in *Favia v. Indiana University of Pennsylvania*, 7 F.3d 332, 341 (3d Cir. 1993), held that a plaintiff may seek modification to increase the burden on the defendant under the relaxed standard pronounced in *Rufo*. *See also United States v. Western Electric Co., Inc.*, 46 F.3d 1198, 1202 (D.C.Cir. 1995)(stating that, under *United Shoe*, "[a]t the request of the party who sought the equitable relief, a court may tighten the decree in order to accomplish its intended result").[12]

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[12] Earlier decisions in the Ninth and Eleventh Circuits also contribute to the consensus that district courts have a flexible mandate to give effect

(continued...)

III. THIS IS NOT AN APPROPRIATE CASE FOR SUPREME COURT REVIEW

Petitioners claim that review is warranted to establish the governing rule as to the proper implementation of consent decrees. However, two factors substantially limit any future impact of this case.

First, the issue of enforcement or modification of consent decrees is an intensely fact-specific inquiry which must ultimately be determined on a case-by-case basis. The court orders from which petitioners seek *certiorari* were based on extensive knowledge by the Court Monitor and the district court of the complex procedural history of this case, the negotiations of the Consent Decree, Manuals, and Monitoring Order, the intricacies of the state budget process, the degree of urgency in regard to the need for additional staffing, and a thorough understanding of the timetables necessary to implement training and staffing patterns to reach the court-ordered mandates. Given that the Second Circuit's approval of the district court's orders relied heavily on unique factual circumstances, the decision in this case is not generally applicable to enforcement or modification of consent decrees in other institutional reform litigation and will provide very little precedential value.[13]

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[12] (...continued)
to the purposes of a consent decree. *See Thompson v. Enomoto*, 915 F. 2d 1383, 1388 (9th Cir. 1990), *cert. denied*, 502 U.S. 1071 (1992)("A district court has the power to modify a consent decree if experience with the administration of the decree shows the need for modification in order to accomplish the primary goals of the decree"); *Williams v. Butz*, 843 F.2d 1335, 1338 (11th Cir.), *cert. denied*, 488 U.S. 956 (1988) ("[T]he job of a district court . . . is to look at the particular facts and circumstances of the case to determine whether the modification satisfies the underlying purpose of the decree").

[13] It is precisely because of these factual complexities that deference to a (continued...)

Second, petitioners' argument that approval of broad equitable authority of a district court to enforce essential goals of an institutional consent decree will "discourage defendants from settling institutional reform litigation by consent decree," Pet. Br., p.16, ignores the unique procedural mechanisms set forth in the particular Monitoring Order of this case. Advance notice to petitioners of potential noncompliance and a dispute resolution process to resolve differences not only has the advantage of averting any immediate contempt findings against the petitioners but also avoids "lengthy and expensive formal judicial proceedings" and expedites relief to the plaintiff class. Pet. App. 19-A. *See also Rufo*, 502 U.S. at 382-83.

Indeed, the court of appeals acknowledged its appreciation of the "admirable cooperation of the parties and the careful, diligent work of the Court Monitor." Pet. App. 19-A. Consequently, petitioners' public policy argument is unsupported by the factual and procedural uniqueness of this case, and contrary to the very purposes underlying the Monitoring Order.

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[13] (...continued)
district court's discretion is heightened in cases involving institutional consent decrees. *Rufo*, 502 U.S. at 394 (O'Connor, J., concurring) ("heightened" deference to district court's exercise of discretion in overseeing a large public institution over a long period of time); *Hutto v. Finney*, 437 U.S. 678, 688 (1978)("special deference" given to trial judge's years of experience with the problems supervising prison reform consent decree); *Western Electric Co., Inc.*, 46 F.3d at 1205 (district court's twelve-year administration of decree was "entitled to a large measure of respect"); *Cooper v. Noble*, 33 F.3d 540, 543 (5th Cir. 1994) ("substantial deference" owed to magistrate judge's many years of experience supervising prison reform consent decree); *Wilder v. Bernstein*, 49 F.3d 69, 75 (2d Cir. 1995)(deference given to the trial judge's interpretation of the terms within the decree).

CONCLUSION

Accordingly, for all the foregoing reasons, petitioners' request for a writ of *certiorari* should be denied.

Respectfully submitted,

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Dated: May 22, 1995

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

JUAN F., by and through his next friends Brian Lynch and Isabel Romero, on behalf of themseives and all others similarly situated, *et al.*,	:	Civil H-89-859 AHN
Plaintiffs,	:	June 25, 1993
v.	:	
WILLIAM O'NEILL, *et al.*,	:	915 Lafayette Boulevard
Defendants.	:	Bridgeport, Connecticut

BEFORE:

THE HONORABLE ALAN H. NEVAS, U.S.D.J.

APPEARANCES:

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THE COURT MONITOR:

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Susan E. Catucci, RPR-CM
Official Court Reporter

MS. PEARLMAN: It has, Your Honor. We have a class of applicants that will be hired as of July 23 -- 23rd that will have at least 35 -- that's a large class for the training academy, Your Honor. They have to be done in groups. It's like a group comes in, goes through training and it's a phased-in process. They cannot all be hired at the same time. I don't think there is anyone here who will dispute the fact that the Department cannot be July 1st hire 145 staff.

MR SULLIVAN: Your Honor, I would dispute that. I don't want to become an advocate in this situation, I've been trying to be impartial, but all that Attorney Pearlman has just said in the last five minutes is totally contrary to what has been reported to me by the Department. The Department has assured me that they have conducted at least one hundred preliminary interviews from this pool. This was an issue that was raised by the General Assembly and which the Commissioner and I discussed enumerable times. A year ago the General Assembly used as an argument the fact that the Department was not geared up and ready to hire people and if they gave them the money they couldn't put the people to work. The Commissioner assured me that she in her fight with the Legislature when this issue was raised, she specifically pointed out to them that the Department was ready and able to train the people and put them into the training process on July 1st.

There is a training academy which is located here in Bridgeport. It's very well staffed. It is professionally staffed. I have been there myself any number of times and sat through the classes. I have addressed graduates of the training process. To come in now before Your Honor and say we cannot hire these people is contrary to everything that's been reported to me as monitor. I have been assured that there are at least a hundred people who could begin the process almost immediately, and in fact we were told at my hearings that that process was under way.

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

JUAN F., by and through his next friends Brian Lynch and Isabel Romero, on behalf of themselves and all others similarly situated, *et al.*,	:	
	:	Civil No. H-89-859
v.	:	(AHN)
WILLIAM O'NEILL, *et al.*,	:	Honorable Alan H. Nevas

Monitor's Certification of Issues and Recommendations

June 15, 1993

* * *

Monitor's Report

Page 7 of 31

Monitor's Findings

1. DCYS Alternative Hiring Plan

During the course of the Monitor's compliance meeting on this matter, the Department formally offered a hiring plan which, if approved, would provide 115 additional social workers in SFY 93-94. Funding of this plan would be provided by internal transfers of funds within the Department

and would require the Finance Advisory Committee's (FAC) approval. The specific funding sources are:

• SYF93 carry forward of:	$1,110,000
• SFY94 equipment reallocation of:	303,000
• Savings from turnover, overtime and other personnel:	1,000,000
• Other savings:	672,000
TOTAL:	$3,085,000

The Department is to be commended for developing an alternative hiring plan to ameliorate the affect of the budgetary and staffing reductions imposed by the General Assembly. However, adequate funding of all 115 positions is questionable and raises serious issues of deficit financing. Even if the entire funding proposal were approved and the 115 additional staff were hired between August, 1993 and June, 1994, **the Department would still have 58 fewer social workers at the end of SFY 94 than are required by the Consent Decree for July 1, 1994.**

In addition the alternative hiring plan does not address the continuation of any positions established in this *ad hoc* manner since they are not presently included in the SFY 94-95 budget. As the Deputy Secretary of the Office of Policy and Management testified during the compliance meeting, it is unclear how binding the SFY 94-95 budget will be because this is the first biennial budget adopted since the General Assembly began meeting on an annual basis.

Commendable as this effort by the Department may be, the results of the DCYS hiring plan, by the Defendant's own admission, do not resolve the staffing deficiency in any permanent or substantive manner. Thus, the alternative hiring plan does not achieve full compliance or a level of staffing that could be described as "substantial compliance," and therefore, should not be considered by the Court.

2. DCYS Staffing and Caseload Reduction

* * *

As part of the budgetary process submitted through the Office of Policy and Management and the Governor's Office to the General Assembly, the Department of Children and Youth Services and the Governor requested funding in the amount of $11,894,424 to hire additional social workers and social work supervisory and support staff necessary to meet Consent Decree mandates during SFY 93-94. The approved budget provided $3,104,932 for this purpose, or **$8,789,492 less than required**. The staffing required and provided are detailed in the pages which follow. DCYS requested 290 social worker positions in its budget request for SY1994, 145 to be hired on July 1, 1993 and 145 to be hired on January 1, 1994. The approved budget gave the DCYS 30 social worker positions on August 1, 1993 and 65 social worker positions on February 1, 1994, for a total of 95 in SY1994.

* * *

A social worker hired on August 1, 1993 will not be able to handle a full caseload until January of 1994; and if a social worker is hired on February 1, 1994 a full caseload cannot be handled until July 1994 at the earliest.

In each of these instances, the additional social workers will have little or no effect on caseload reduction for six months after their employment because of the mandated training period during which they are allowed to handle only minimal caseloads.

* * *

In summary, the Department of Children and Youth Services has approved funding to hire an additional 95 social workers and 67 additional social work supervisory and support staff as of July 1, 1994. This staffing would leave the

Department **with 173 fewer social workers and 133 fewer social work supervisory and support staff than are necessary to meet the Consent Decree requirements of July 1, 1994**.

It is indisputable that at the beginning of the SY1993-1994 the existing caseload standards are totally unacceptable. Even with the addition of the ninety-five (95) social workers and sixty-seven (67) additional social work supervisory and support staff authorized during SFY 1993-1994, the Department will not reach a social worker staffing level sufficient to meet Consent Decree caseload standards by July 1, 1994 as required.

Supreme Court, U.S.
FILED
MAY 23 1995
CLERK

No. 94-1731

In the

Supreme Court of the United States

October Term, 1994

JOHN G. ROWLAND, GOVERNOR OF THE STATE OF CONNECTICUT, LINDA D'AMARIO ROSSI, COMMISSIONER, STATE OF CONNECTICUT DEPARTMENT OF CHILDREN AND FAMILIES,

Petitioners,

v.

JUAN F., ET AL.,

Respondents.

On Writ of Certiorari
To the United States Court of Appeals
For the Second Circuit

BRIEF OF THE STATES OF FLORIDA, et al. AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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No. 94-1731

In the

Supreme Court of the United States

October Term, 1994

JOHN G. ROWLAND, GOVERNOR OF THE STATE OF CONNECTICUT, LINDA D'AMARIO ROSSI, COMMISSIONER, STATE OF CONNECTICUT DEPARTMENT OF CHILDREN AND FAMILIES,

Petitioners,

v.

JUAN F., ET AL.,

Respondents.

On Petition for Writ of Certiorari
To the United States Court of Appeals
For the Second Circuit

BRIEF OF THE STATES OF FLORIDA, et al. AS AMICI CURIAE IN SUPPORT OF PETITIONERS

INTEREST OF THE AMICI CURIAE

Amici states are often parties to institutional reform consent decrees, and other types of consent decrees. *Amici* respectfully submit this brief in support of petitioner, John G. Rowland, Governor of the State of Connecticut, and other petitioners.

The Second Circuit's decision in this case graphically illustrates the need for principled guidelines for federal courts when confronted with a demand to increase the obligations of a state governmental entity under a consent decree. The Second Circuit approved the district court's expansion of a consent decree so as to require Connecticut's Department of Children and Families to hire 490 employees pursuant to a timetable unilaterally set by the district court. *Juan F. by and through Lynch v. Weicker*, 37 F.3d 874 (2d Cir. 1994). *Amici* assert that federal courts have no authority to increase the obligations of an unconsenting state governmental entity beyond the terms of the consent decree where no violation of federal law has been adjudicated, and respectfully request that this Court grant certiorari to address the issues raised by this case.

ARGUMENT

I. A FEDERAL COURT'S EXPANSION OF THE OBLIGATIONS OF A STATE GOVERNMENTAL ENTITY UNDER AN INSTITUTIONAL REFORM CONSENT DECREE PRESENTS A NATIONAL PROBLEM REQUIRING RESOLUTION BY THIS COURT.

A. The instant case graphically illustrates the need for this Court to articulate strict standards preventing unilateral expansion of state obligations beyond the express terms of a consent decree.

In the instant action, Connecticut's Department of Children and Families (DCF) entered into a consent decree to reform the state child welfare system. The decree was agreed to prior to any adjudication on the merits; the state was never found to be in violation of any federal constitutional provision or law. Under the terms of the decree, DCF was required to meet certain caseload ratios by July 1994; the decree specifically left it to DCF to determine how to meet the ratios. Most importantly, because the number of DCF cases fluctuates, the decree contained no hiring timetables or hiring quotas. When the Connecticut General Assembly failed to fund all of the caseworker positions that DCF requested to comply with the decree, DCF developed a plan that would enable it to be in

substantial compliance with the caseload ratios by the July 1, 1994 deadline. Despite the fact that it was more than one year before the compliance deadline and that DCF was at the time in compliance, respondents notified the court-appointed monitor that they would seek contempt and other relief in the district court.

On June 15, 1993, the monitor issued a report recommending that the consent decree be modified based on his prediction that DCF would not be in 100% compliance by the July 1, 1994 deadline. The district court adopted the monitor's recommendations, on June 25, 1993, and ordered that DCF hire 248 case workers by July 1, 1993,[1] and 242 case workers by January 1, 1994. Neither these deadlines nor the hiring quotas are contained in the consent decree agreed to by the parties.

On appeal, the Second Circuit upheld the district court's order and ruled that the district court's accelerated hiring timetable was not a modification of the decree. In the alternative, the Second Circuit held that even if the hiring timetable was a modification, it satisfied the criteria announced by this Court in *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 112 S.Ct. 748 (1992). In *Rufo*, this Court held that when a significant factual or legal change occurs, the federal district court must first determine whether a decree modification is 'warranted'; and if so, whether the proposed modification is 'suitably tailored' to the changed circumstance. *Rufo*, 112 S.Ct. at 760. The Second Circuit held that the district court's order was not a modification of the decree because the district

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[1] Six days later.

court's accelerated hiring timetable ensured compliance with the time frame for meeting caseload ratios established by the decree. Alternatively, the Second Circuit reasoned that under *Rufo*'s standard, the Connecticut General Assembly's failure to appropriate all the requested funds constituted a significant factual change justifying the accelerated hiring timetable ordered by the district court.

Amici submit that the Second Circuit erred when it determined that: (1) the district court's accelerated hiring timetable was not a modification of the decree; and that (2) even if it was, it passed constitutional muster because it satisfied the *Rufo* criteria for decree modification. This case illustrates the need for principled standards for federal courts to evaluate demands to expand a state's obligations under a consent decree, where the state has not been held to have violated federal rights.

Rufo does not address the situation presented by this case: what standards apply to a demand by plaintiffs to increase a state governmental entity's obligations under a consent decree absent an adjudicated violation of federal rights. The parties in *Rufo* did not brief the issues raised in this case, nor were they considered by this Court. Rather in *Rufo*, the sheriff of Suffolk County, Massachusetts, moved to reduce the state's obligations under a consent decree which county officials had entered into after a district court held that the conditions at the Suffolk County jail were constitutionally deficient. The order required construction of a new jail facility: the sheriff sought to allow double bunking in some cells, to raise the capacity of the new jail. The sheriff argued that this modification was required by a legal change, this Court's decision in *Bell v. Wolfish*, 441

U.S. 520 (1979), and a factual change, an increase in pretrial detainees. The district court rejected the proposed modification, in part because, in the court's view, one of the underlying, but unstated, purposes of the decree was to provide single cells, and the First Circuit affirmed. *Rufo*, 112 S.Ct. at 759. Rejecting that reasoning, this Court held that "[m]odification of a consent decree may be warranted when changed factual conditions make compliance with the decree more onerous." *Id.*, at 760.

Because *Rufo* does not address the problems presented by the Second Circuit's holding in this case, this Court should grant review. *Amici* submit that a federal court's remedial power in a consent decree where no violation of federal law has been adjudicated is authorized solely by the parties' consent. *Local No. 93, International Assoc. of Firefighters v. City of Cleveland*, 478 U.S. 501, 522 (1986).[2] Consequently, a federal court has no power to increase the obligations of a party beyond those set out in the decree. It follows that federal courts are bound by the text of the decree in evaluating demands for modification and must reject demands that increase a party's obligations beyond the terms agreed to. A textual approach to consent decree modification would prevent the result of the Second Circuit's holding in this case, as well as encourage resolution by consent decrees because parties would be guaranteed that their obligations would not be expanded beyond their means.

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[2] Hereinafter, "*Firefighters*".

B. Federal courts' expansion of state obligations under a consent decree, absent an adjudication on the merits, raises significant federalism concerns.

Expansion of the terms of any consent decree raises the problem of federal courts exceeding their authority. Modification of institutional reform consent decrees raises additional significant federalism concerns where, as in this case, it allows a federal court to impose on a state governmental entity obligations to which the state did not agree, where no constitutional or federal violation has been adjudicated. Although this Court has never disallowed remedial relief ordered by a federal district court solely on the ground that it unconstitutionally intrudes on state sovereignty, the Court has held that such constraints do exist. In *Rufo*, this Court stated "[f]ederal courts may not order States or local governments, over their objection, to undertake a course of conduct not tailored to curing a constitutional violation that has been adjudicated." *Rufo*, 112 S.Ct. at 762.[3] These principles remain vital: only a few weeks ago, in *United States v. Lopez*, Justice Kennedy noted the Court's continuing duty "to consider [the federal

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[3] *See also Allen v. Wright*, 468 U.S. 737, 760-1 (1984); *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 104 n.13 (1984); *City of Los Angeles v. Lyons*, 461 U.S. 95, 112 (1983); *Hills v. Gautreaux*, 425 U.S. 284, 293 (1976); *Rizzo v. Goode*, 423 U.S. 362, 379 (1976) ("appropriate consideration must be given to principles of federalism in determining the availability and scope of equitable relief"); *Lorain NAACP v. Lorain Bd. of Education*, 979 F.2d 1141 (6th Cir. 1992), *cert. denied*, ___ U.S. ___, 113 S.Ct. 2998 (1993)

courts'] place [vis-a-vis the states] in the design of the Government and to appreciate the significance of federalism in the whole structure of the constitution." ___ U.S. ___, 63 U.S.L.W. 4343, 4350-51 (1995) (Kennedy, J., concurring). If allowed to stand, the Second Circuit's decision in this case and its progeny will weaken the principles of federalism which this Court upheld in *Rufo*, and recently reaffirmed in *Lopez*.

Ordinarily, federal equitable relief cannot be granted against a state unless a federal court has concluded that federal rights have been violated or the parties consent to a judgment.[4] This principle serves as a check on federal intrusion on state sovereignty. However, most consent decrees, as in this case, are entered into before federal rights or violations are adjudicated, so that a federal court's authority to enter the decree depends on the agreement of the state. *Firefighters*, 478 U.S. at 522. In *Firefighters*, this Court expressly affirmed a federal court's power to embody in a consent decree relief that it could not order had the case gone to trial -- because a consent decree represents a voluntary agreement of the parties. *Id.* at 522.[5] *Firefighters* confirms both the

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[4] *Milliken v. Bradley*, 418 U.S. 717, 744-45 (1974) (*Milliken I*); *also Milliken v. Bradley*, 433 U.S. 267, 281 (1977) (*Milliken II*); *Swann v. Charlotte-Mecklenburg Bd. of Education*, 402 U.S. 1 (1971).

[5] *See also Turner v. Orr*, 759 F.2d 817 (11th Cir. 1985), *cert. denied*, 478 U.S. 1020 (1986); *Sansom Comm. v. Lynn*, 735 F.2d 1535, 1538 (3d Cir.), *cert. denied sub nom. Trustees of University of Pennsylvania v. Sansom Comm.*, 469 U.S. 1017 (1984); *Citizens for a Better Environment v. Gorsuch*, 718 F.2d 1117, 1125-26 (D.C. Cir. 1983), *cert. denied sub nom. Union Carbide Corp. Natural Resources Defense Council, Inc.*, 467 U.S. 1219 (1984); *E.E.O.C. v. Safeway Stores, Inc.*, 611 F.2d 795, 799-

broad scope of federal remedial power in a consent decree and the limits of that power -- to the terms to which the parties consented. Allowing federal courts to abuse their extraordinary consent decree powers, as the Second Circuit did here, stands the principle of *Firefighters* on its head.[6]

Moreover, where, as here, the federal court exceeded its authority vis-a-vis a state in going beyond the express terms of the decree, basic principles of federalism are also threatened. Because it is a substantially greater federal intrusion on state sovereignty to impose equitable remedies on a state governmental entity when it has not actually violated a plaintiff's federal rights, federalism concerns are stronger where federal courts seek unilaterally to modify consent decrees so as to impose on the state governmental entity obligations beyond those to which the state agreed. Indeed, this Court in *Rufo* indicated that the district court erred in looking beyond the express terms of the consent decree in rejecting limited double celling of pretrial detainees. *Rufo*, 112 S.Ct. at 761. *Rufo* suggests a rule consistent with *Amici's* position here: a state may agree to relief beyond the terms of a consent decree, but cannot be required to provide such relief, at least absent an adjudicated violation of federal law. *See*, *id.* at 762. Rather, the

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800 (10th Cir. 1979), *cert. denied sub nom. Courtwright v. E.E.O.C.*, 446 U.S. 952 (1980).

[6] *See Fox v. United States Dep't of Housing and Urban Dev.*, 680 F.2d 315 (3d Cir. 1982) (imposing additional duties on defendants is unauthorized if the court has not adjudicated that defendant violated plaintiff's rights, absent exceptional circumstances).

enforceable obligations of the state must be determined by the express terms of the decree.

There are basic structural reasons for restricting federal courts to the text of a decree: in unilaterally increasing the obligations of a state governmental entity, federal courts may also violate provisions of the party state's constitution. For example, when a federal district court modifies a consent decree to require the state's legislature to fund the terms of the decree or to require a state governmental entity to re-prioritize legislative funding to comply with the decree, this constitutes a federally mandated violation of the state constitution's separation of powers provision[7] and may raise Tenth[8] or Eleventh Amendment[9] issues as well.

Finally, the general inapplicability to federal consent decrees of other federalism-serving doctrines, such as the Article III "case or controversy"[10] requirement and the Eleventh Amendment, renders equitable relief under consent

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[7] *See United States v. Board of Education*, 588 F. Supp. 132 (N.D. Ill.) (district court ordered Department of Education to set aside $14.6 million in appropriations to desegregate Chicago's schools), *reversed*, 744 F.2d 1300 (7th Cir. 1984) (held district court misinterpreted consent decree; issue of whether district court violated the federal separation of powers provision was not reached), *cert. denied*, 471 U.S. 1116 (1985).

[8] U.S. CONST. amend. X.

[9] U.S. CONST. amend. XI. *See Washington v. Penwell*, 700 F.2d 570 (9th Cir. 1983) (requirement that state fund general legal services for prisoners void under Oregon constitution's separation of powers provision and the Eleventh Amendment).

[10] U.S. CONST. art. III, § 2.

decrees even more problematic. This Court has held that consent decrees do not run afoul of the constitutional "case or controversy" requirement.[11] Moreover, most federal courts that have held that the provisions of the Eleventh Amendment are generally inapplicable to federal consent decrees against state governmental entities for different reasons. First, because consent decrees mandate prospective relief against state officials, they do not fall within the scope of the Eleventh Amendment.[12] Second, the state's consent to the decree may constitute a waiver of its immunity from suit in federal court.[13] Finally, some courts have held that any order enforcing a valid consent decree is not barred by the Eleventh Amendment.[14] While the application of the Eleventh Amendment in the context of federal consent decrees is complex, it seems clear that both of these

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[11] *Swift & Co. v. United States*, 276 U.S. 311 (1928)

[12] *See Wisconsin Hosp. Ass'n v. Reivitz*, 820 F.2d 863, 868 (7th Cir. 1987); *New York State Ass'n for Retarded Children, Inc. v. Carey*, 596 F.2d 27, 39 (2d Cir.), *cert. denied sub nom. Coughlin v. New York State Ass'n for Retarded Children, Inc.*, 444 U.S. 836 (1979); *Vecchione v. Wohlgemuth*, 558 F.2d 150, 158 (3d Cir.), *cert. denied sub nom. Beal v. Vecchione*, 434 U.S. 943 (1977); *but see Pennhurst, supra*, footnote 3 (prospective relief against state officials under state law barred by the Eleventh Amendment); *cf. Ex parte Young*, 209 U.S. 123, 155-56 (1908) (prospective relief against state officers not barred by Eleventh Amendment).

[13] *See Carey*, 596 F.2d at 39; *Jordan v. Fusari*, 496 F.2d 646, 651 (2d Cir. 1974); *Laura I. v. Clausen*, 676 F. Supp. 717, 719 (M.D. La. 1988).

[14] *See Hutto v. Finney*, 437 U.S. 678, 691-92 (1978) (monetary penalties imposed to enforce an injunction are not barred by the Eleventh Amendment); *Reivitz*, 820 F.2d at 868; *Vecchione*, 558 F.2d at 158.

doctrines, that regularly limit the scope of federal injunctive power and serve federalism goals, do not usually apply to the entry and enforcement of consent decrees. Their inapplicability to consent decrees increases the risk that federal courts may inadvertently modify a decree in violation of state sovereignty.

Indeed, several federal courts of appeal have refused to modify consent decrees because they have realized the dangers of allowing federal courts to expand state obligations under a consent decree absent a violation of federal rights. For example, in *Johnson v. Robinson*, 987 F.2d 1043 (4th Cir. 1993), the Fourth Circuit held that the district court abused its authority under a consent decree involving Maryland's prison system when it adopted a timetable which was not in the decree, within which Maryland prison officials had to make 83 improvements at prison facilities. The court emphasized that the parties never formally agreed upon the duties in the specified timetable, which added substantially to those accepted by prison officials in the original decree. Thus, the court held that because the binding force of a consent decree comes from the agreement of the parties, the district court may not use its decree enforcing power to enlarge or diminish the duties to which the parties have agreed and which the court has approved.

Similarly, in *United States v. Michigan*, 940 F. 2d 143 (6th Cir. 1991), *cert. denied*, ___ U.S. ___, 115 S.Ct. 312 (1994), the Sixth Circuit held that the district court abused its discretion and overly intruded upon the sovereignty of the state of Michigan when it unilaterally modified and extended a program classification plan for prisons being used by Michigan, where program

classification was excluded from the consent decree. In this action, the United States and Michigan had entered into a consent decree to resolve alleged violations of the Civil Rights of Institutionalized Persons Act, 42 U.S.C. §1997. In implementing the consent decree, the district court issued five orders requiring Michigan to justify, explain, and validate the program classification plan, and requiring that the plan encompass a state-wide classification system. On appeal, the circuit court held that the district court abused its discretion when it modified and extended the plan.

The Tenth Circuit likewise vacated a district court's modification of a consent decree because the court found that the district court unilaterally discarded the balance struck by the parties concerning duration and procedures for dismissing the consent decree and substituted its own procedures and time frame. *United States v. Colorado*, 937 F.2d 505 (10th Cir. 1991). The Tenth Circuit concluded that the district court abused its discretion in modifying the proposed consent decree and remanded the case for further proceedings to determine whether the parties' unmodified stipulations, should be accepted or not.[15]

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[15] *See Woodson v. Sully*, 801 F. Supp. 466 (D. Kan. 1992) (district court refused needed modification because found proposed amendment involved too great an intrusion by the court into management of county, especially where parties were not in agreement); and *see also Jacksonville Branch, NAACP v. Duval County School Bd.*, 978 F.2d 1574 (11th Cir. 1992) (NAACP not entitled to modify consent decree to restrict school board's freedom to implement its school desegregation plan, absent plan's failure to accomplish consent decree objectives).

Unlike the Second Circuit, these courts properly considered the effect of a federal court's unilateral modification of a consent decree on state sovereignty. Had these modifications been allowed, courts would be free to rewrite the terms of consent decrees entered into by governmental entities. Such a result will either weaken the structural guarantees of federalism or effectively prohibit the use of consent decrees by governmental entities altogether.

One of the advantages of a consent decree is that both parties have an investment in the success of the decree.[16] Accordingly, compliance is usually not a problem. However, when a court unilaterally modifies a decree, it necessarily disturbs the balance struck by the parties.[17] As a result, cooperation and compliance from the parties may become increasingly difficult.

The most obvious effect of the Second Circuit's decision is that federal and state governmental agencies will be prohibited from resolving institutional reform litigation through consent decrees. For example, in 1986, the Attorney General of the United States issued guidelines to Department of Justice attorneys instructing them not to enter into consent decrees that would bind the executive discretion

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[16] *See* Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976).

[17] *See Duran v. Elrod*, 713 F.2d 292, 296-97 (7th Cir. 1983), *cert. denied*, 465 U.S. 1108 (1984); *United States v. Motor Vehicle Mfrs. Ass'n*, 643 F.2d 644, 651 (9th Cir. 1981); *United States v. City of Providence*, 492 F. Supp. 602, 608 (D.R.I. 1980); *United States v. Shubert*, 163 F. Supp. 123, 124 (S.D.N.Y. 1958).

of subsequent administrations.[18] This policy was the result of three cases: (1) *Ferrell v. Pierce*, 743 F.2d 454 (7th Cir. 1984), where a district court refused to allow the Department of Housing and Urban Development to adopt a congressionally approved alternative to the assignment program required by a decree; (2) *United States v. Board of Education*, 588 F. Supp. 132 (N.D. Ill.), *vacated*, 744 F.2d 1300 (7th Cir. 1984), *cert. denied*, 471 U.S. 1116 (1985), where a district court interpreted a consent decree to require affirmative legislative and other funding efforts by the executive branch; and (3) *Citizens for a Better Environment v. Gorsuch*, 718 F.2d 1117 (D.C. Cir. 1983), *cert. denied sub nom. Union Carbide Corp. v. Natural Resources Defense Council, Inc.*, 446 U.S. 952 (1980), where, despite Congress's enactment of the Clean Water Act of 1977, a district court refused to vacate a consent decree that specified methodology and criteria to be used by the EPA in amending regulations.[19]

The Attorney General believed that using consent decrees which circumscribed the executive discretion of subsequent administrations unconstitutionally expanded judicial power at the expense of the executive and legislative branches of government. Thus, the policy was directed to avoid the result of *Ferrell*, *Board of Education* and

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[18] *See* Paul D. Windsor, *Separation of Powers and the Reagan Administration's Policy on Consent Decrees: Have the Courts Overstepped the Limits of Judicial Powers?*, 1989 Ill. L. Rev. 541, 567-70 (1989). (Appendix).

[19] *See Gorsuch*, 718 F.2d at 1130 (Wilkey, J., dissenting) ("such decrees invite judicial abuse of the separation of powers doctrine").

Gorsuch. Specifically, the policy forbade consent decrees that encroached upon an executive department's or government agency's discretionary power to: (1) promulgate regulations; (2) seek or spend funds; and (3) perform other discretionary activities. Some states have also shared the federal government's response to consent decrees. For example, Florida Governor Lawton Chiles will not approve any consent decrees to which the state or one of its agencies is a party.[20] As a result, institutional reform cases will go to trial in federal court rather than be resolved through consent decree, and the benefits of consent decrees will be lost.[21]

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[20] See Declaration of Kimberly Tucker, General Counsel, Florida Department of Health and Rehabilitative Services, dated May 18, 1995 (signed original lodged with the Court).

[21] In several civil rights areas where consent decrees are commonplace, Congress affirmatively expressed its preference for voluntary resolution. *See, e.g., Firefighters*, 478 U.S. at 524 n.13 (legislative history of Title VII reflects congressional preference for voluntary remedial action). The Second Circuit's view of consent decree modification, like the Union's view of consent decrees in *Firefighters*, would make it substantially more difficult to settle litigation under those statutes, contrary to the expressed legislative preference.

CONCLUSION

For the foregoing reasons, this Court should grant certiorari.

Respectfully submitted,

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May 22, 1995

Supreme Court, U.S.
FILED
JUN 1 1995
OFFICE OF THE CLERK

(4)

No. 94-1731

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

JOHN G. ROWLAND, GOVERNOR OF THE STATE OF CONNECTICUT, LINDA D'AMARIO ROSSI, COMMISSIONER, STATE OF CONNECTICUT DEPARTMENT OF CHILDREN AND FAMILIES,

Petitioners,

vs.

JUAN F., ET. AL.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONERS' REPLY MEMORANDUM

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REASONS FOR GRANTING THE WRIT[1]

As Petitioners have set forth in detail in their Petition for Writ of Certiorari, Supreme Court review of this case is necessary because the Second Circuit has rendered a decision in direct conflict with this Court's rulings in *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561 (1984) and *Rufo v. Inmates of the Suffolk County Jail*, 502 U.S. 367 (1992), and with the ruling of the Sixth Circuit in *NAACP v. Lorain Board of Education*, 979 F.2d 1141 (6th Cir. 1992), *cert. denied*, __ U.S. __, 113 S.Ct. 2998 (1993). The Respondents strive to obscure the clear legal conflicts inherent in the Second Circuit's ruling by relying upon immaterial facts and by asserting that obviously inapplicable cases in this Court and other circuits are consistent with the Second Circuit's holding. Their arguments, however, merely serve to highlight the need for review of this case. Nothing in the Respondents' brief alters the conclusion that review of the Second Circuit's ruling is essential in order to resolve the conflicts presented in this petition so as to preserve consent decrees as a viable option for settling institutional reform litigation.

I. NOTHING IN RESPONDENTS' BRIEF ALTERS THE CONCLUSION THAT THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT HAS RENDERED A DECISION IN DIRECT CONFLICT WITH THIS COURT'S RULING IN *FIREFIGHTERS LOCAL NO. 1784 V. STOTTS*, 467 U.S. 561 (1984).

The Respondents do not deny that, under *Stotts*, consent decrees, like contracts, must be construed within the four corners of the parties' agreement. They attempt to distinguish

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[1] The Petitioners reassert and incorporate herein all of the reasons for granting the writ set forth in their Petition for Writ of Certiorari. This reply brief is submitted in order to respond to specific points raised by the Respondents in their Brief in Opposition.

Stotts from the present case, however, by claiming that *Stotts* concerned the court's authority to "construe" a consent decree, whereas this case concerns the court's authority to "implement" a consent decree. According to the Respondents, courts are free to go outside the four corners of the parties' agreement as long as they are implementing and not construing the decree.

Significantly, the Respondents cite no legal authority that supports this claim.[2] Although the Respondents claim that the cases cited by the Petitioners comport with the Second Circuit's ruling, in fact those cases all applied the four corners rule set forth in *Stotts* and made no distinction between implementation and construction of a decree. Furthermore, with regard to the additional cases offered by the Respondents, *United States v. Knote*, 29 F.3d 1297 (8th Cir. 1994) also applied contract principles to construe a decree and *E.E.O.C. v. Local 580*, 925 F.2d 588 (2d. Cir. 1991) concerned the application of appropriate remedies after a finding of contempt. Neither case advances the Respondents' argument, and the latter case is wholly inapplicable given the lack of any finding of contempt in the present case. Finally, the language in *NAACP v. Lorain Board of Education*, 979 F.2d 1141 (6th Cir. 1992), *cert. denied*, __ U.S. __, 113 S. Ct. 2998 (1993), which the Respondents quote out of context, is a reference to the fact that a court may *modify* a decree beyond its four corners in the context of a defendant's request to do so, in order to effectuate its purpose. Given the Respondents' claim

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[2] It might appear from the way the Respondents have positioned the quotation marks in the quotation from the Second Circuit's decision, on page 5 of their brief, that the Second Circuit was relying on the authority of this Court in *United States v. ITT Continental Baking Co.*, 420 U.S. 223, 236-37 (1975), when it claimed that a court, in implementing a decree, is not rigidly confined to the terms contained within the four corners of the parties' agreement. A review of the Second Circuit's opinion, Pet. app. 10-A, and *ITT Continental Baking Co.* quickly reveals, however, that the Second Circuit cites *no* authority for the legal principle it asserts and, moreover, nothing in *ITT Continental Baking* supports the Second Circuit's position.

that the District Court's order was an implementation, not a modification, modification cases are clearly inapplicable.

In addition to the fact that there is no authority supporting the Second Circuit's distinction between implementing and construing a consent decree, to conclude that the District Court's order in this case was merely an "implementation" of existing contractual terms of the decree stretches the concept of implementation to an absurd extreme.[3] The consent decree at issue was carefully written to contain no hiring requirements or timetables other than the July 1, 1994 compliance deadline which, at the time of the District Court's order, was more than one year away. As the Respondents concede, the State agreed only to meet certain caseload ratios, thereby retaining the remedial flexibility so critical to an executive branch agency of government when grappling with issues that effect and are affected by the legislative branch's budgetary process. As the amici states point out, court imposed obligations of an executive branch agency can have tremendous financial and separation of powers implications for a state (Amici Curiae Brief at 10), and therefore DCF intentionally negotiated terms of a consent decree that would preserve its ability to achieve the goals of the decree through a variety of alternatives. Clearly, having flexibility in designing and implementing the means of achieving compliance with the decree was a critical part of the substance and scope of the decree, and it is the existence of this very flexibility that induced the State to enter the decree. By depriving the State of the ability to fashion its own method for achieving compliance, the court modified the very essence of

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[3] In an attempt to bolster their claim that the parties anticipated such intervention by the District Court, Respondents emphasize that the Decree provided for continuing jurisdiction by the District Court to ensure compliance. This provision has no added significance. A court ordinarily retains jurisdiction to ensure compliance with a consent decree whether or not the decree contains such a provision. *See* e.g. *Picon v. Morris*, 933 F.2d 660, 662-663 (8th Cir. 1991); *In re Pearson*, 990 F.2d 653, 658 (1st Cir. 1993).

the decree itself. To permit such a modification of the express terms of a consent decree based on the semantic distinction between "construing" and "implementing" that decree is to obliterate the fundamental principle set forth by this Court in *Stotts* and its progeny. A party that has waived its right to litigate the issues raised in a case, based on its negotiation of and reliance on the precise terms of an agreed upon consent decree, must have assurances that it cannot be forced to go beyond the terms and conditions upon which that waiver is based. Whether the District Court's order is characterized as a "construction," "implementation" or "modification," it is clear that the court fundamentally altered the terms and conditions of the decree. Respondents' argument establishes only one thing — the urgent need for a set of principles for guiding a court's review of a plaintiff's demand to alter the obligations of a governmental entity under a consent decree. *See also* Amici Curiae Brief at 2.

II. THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT HAS RENDERED A DECISION THAT CONFLICTS WITH AND UNDERMINES THIS COURT'S RULING *IN RUFO V. INMATES OF THE SUFFOLK COUNTY JAIL*, 502 U.S. 367 (1992), AND DIRECTLY CONFLICTS WITH A RULING OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

Respondents concede that the Second Circuit erred in applying the *Rufo* standards to the District Court's modification of the consent decree in this case because the holding in *Rufo* concerns the modification of a decree sought by a government defendant. Respondents' Brief at 9-10.[4] Nonetheless they

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[4] Importantly, Respondents' agreement that the Second Circuit has misapplied *Rufo* to this case further supports the need for this Court to clarify the scope of its decision in *Rufo* as it relates to a court ordered modification of an institutional reform consent decree.

contend, based on a distinct line of cases involving modifications of court imposed injunctive relief, that courts may modify a consent decree at the request of a plaintiff when "additional injunctive relief is necessary" to advance the purposes of the "injunction." Respondents' Brief at p. 10. This argument ignores the fundamental distinction between a consent decree and the order of injunctive relief following a court's consideration of the merits of the case, a distinction critical to this case.

Unlike a court ordered injunction, a consent decree is a negotiated agreement between the parties, in which the parties voluntarily waive their rights to litigate the merits of the underlying issues in order to resolve the litigation. An injunction, on the other hand, is a court order, based on a determination of the merits of the case or, in the case of a preliminary injunction, based on a determination of the plaintiff's likelihood of success on the merits of his claim. Obviously, such a court imposed remedy totally lacks the negotiated contractual attributes of a consent decree. It is clearly improper to conclude, based on a handful of cases upholding modification of injunctive relief,[5] that a consent decree may be unilaterally modified, over the State's objection, to *increase* the burdens on a State, without any regard for the State's plans to implement the decree without modification, and based solely on the court's speculative assessment that the State will fall short of 100% compliance one year in the future.

Moreover, the Respondents' argument that, following this Court's decision in *Rufo*, other courts have upheld such modifications, is equally misleading. *Vanguards of Cleveland v. City of Cleveland*, 23 F.3d 1013 (6th Cir. 1994), cited by Respondents, involved consent decree modifications to which

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[5] It is significant to note that, unlike the present case in which the Petitioners were in compliance with the decree at the time of the District Court's order, the cases cited by the Respondents upholding modification of injunctive relief involve findings of contempt or similar violations of the court's order.

the defendants explicitly agreed. There is no question that a court is free to adopt modifications to which all parties consent. *Favia v. Indiana University of Pennsylvania*, 7 F.3d 332 (3d Cir. 1993) involved modifications of court ordered injunctive relief, which makes this case inapposite for the reasons previously discussed. Finally, the court's decision in *United States v. Western Electric Co., Inc.*, 46 F.3d 1198 (D.C. Cir. 1995) upheld a modification deemed necessary to *ease* the burden on a defendant of a consent decree in response to a change in circumstances that rendered the decree more onerous. Obviously, this case does not advance the Respondents' argument.[6]

Finally, the Respondents mischaracterize *Lorain*, suggesting that the Sixth Circuit would uphold a modification that burdens a defendant "if it furthers the original purpose of the decree in a more efficient way, without upsetting the basic agreement between the parties." Respondents' Brief at p. 11, *quoting Lorain*. Not only does the language quoted by the Respondents say nothing about increasing the burdens on a *defendant*, it explicitly relies upon a prior case in which the court approved modifications to *ease* the burden on a defendant. Indeed, the entire thrust and holding of *Lorain* is that a court may *not* modify an institutional consent decree to impose additional obligations on the state, over the state's objections and in the absence of an adjudicated or admitted violation of law. Thus, contrary to the Respondents' claims, the Second Circuit's ruling in this case is not consistent with any subsequent caselaw and directly conflicts with the Sixth Circuit's holding in *Lorain*.

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[6] Respondents' reliance on two other cases which predate *Rufo* is also misplaced. *Thompson v. Enomoto*, 915 F.2d 1383 (9th Cir. 1990), *cert. denied*, 502 U.S. 1071 (1992) upheld a modification to which the defendants had failed to file a timely legal objection or appeal, and *Williams v. Butz*, 843 F.2d 1335 (11th Cir.), *cert. denied*, 488 U.S. 956 (1988) concerned a modification requested by the government defendant to comply with changes in the law since the entry of the decree. Neither case would support the modifications advanced by the Respondents in the present case.

CONCLUSION

In sum, Respondents have failed to reconcile the Second Circuit's holding with this Court's prior precedents. Failure to review this case, as illustrated by the numerous amici states joining the Petitioner's request for review, will seriously impede the ability of states across the nation to resolve institutional reform litigation on a cooperative basis. For all of the foregoing reasons, and for the reasons set forth in the Petition for Writ of Certiorari, Petitioners respectfully submit that a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

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